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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term, 1992

No. _____

WALTON AUCOIN, WILLIAM CONDON

and STEVEN BERTOLINO, Petitioners

VERSUS

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether a state misdemeanor gambling statute which does not specifically criminalize bookmaking, or the collection or payment of gambling debts, and which does not identify the elements of an illegal gambling business can serve as the predicate for a RICO and an 18 USC 1955 violation.

II.

Whether the RICO statute can be interpreted so as to create new substantive debt collection crimes.

III.

Whether the RICO statute can be interpreted so as to create its own predicate "crimes."

IV.

Whether statutes that criminalize the business of gambling (La.R.S. 14:90 and 18 USC 1955) necessarily criminalize the payment or collection of gambling debt.

V.

Whether the decision below has rendered the RICO statute void for vagueness vis-a-vis gambling offenses because the RICO prongs cannot be reconciled, because the RICO statute conflicts with the

Federal Gambling Statute, and because it is absurd to believe that Congress intended to punish non criminal debt collection conduct as severely as it punishes multiple felonies.

VI.

Whether the vagueness and ambiguity of the RICO statute is revealed by the appeals court's analysis.

VII.

Whether 18 USC 1955 is void for vagueness as applied in the case at bar.

VIII.

Whether the decision below violates principles of statutory construction.

IX.

Whether the conviction of petitioners under both the RICO statute and the gambling statute was to twice punish them for the same conduct.

X.

Whether petitioners conviction under RICO violated the notice requirements of Due Process.

XI.

Whether the records used by a gambler to prepare his gambling tax returns can be used against him in a non tax related gambling prosecution.

XII.

Whether the use of wiretaps violated the attorney-client privilege.

XIII.

Whether jury confusion denied petitioners their right to a fair trial.

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinions of the District Court were not reported.

JURISDICTION

The judgment of the Court of Appeals for the fifth Circuit was entered on June 22, 1992, a Petition for rehearing was denied on July 30, 1992. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Louisiana Revised Statute 14:90 (A) (as it existed at the time of trial) stated that:

> §90. Gambling
>
> A. Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.
>
> Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both. (West 1986).

18 USC 1961(6) states that:

> (6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury,

and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate; (West 1984).

18 USC 1962(c) states that:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. (West 1984).

18 USC 1955(a) and (b) state that:

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section--

(1) "illegal gambling business" means a gambling business which--

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and

conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States. (West 1984).

UNITED STATES CONSTITUTION AMENDMENT V STATES THAT:

"[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amendment V (West Supp. 1987).

UNITED STATES CONSTITUTION AMENDMENT XIV,

SECTION 1, STATES THAT:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilieges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (West 1987).

STATEMENT OF THE CASE

On December 15, 1989, Walton Aucoin, Steven Bertolino, and William Condon (hereinafter also referred to as Petitioners) were indicted along with, among others, New Orleans District Attorney Harry Connick, Aucoin's attorney Pat Fanning, Hollywood actor Paul Burke, and New Orleans business man Wilson Abraham, for the first two counts of a four count indictment (R.vol. 1, p. 276) (hereinafter "Indict.").

Count one charged Aucoin, Bertolino, Condon and others with unlawful debt collection in association with a RICO enterprise in violation of 18 USC 1962. (R.vol. 1, pp. 278-279).

Count two of the indictment charged Aucoin, Condon, Bertolino and others with conducting an illegal gambling business in violation of 18 USC 1955. (R.vol. 1, p. 281).

The federal indictments arose out of the arrest of Petitioners by New Orleans police officers on December 4, 1988, for allegedly operating an illegal gambling business, specifically a bookmaking operation. (R.vol. 1, pp. 276-277).

During the arrest Aucoin's bookmaking records were seized along with his automobile. Id. Aucoin contacted his attorney Pat

Fanning in an attempt to secure the return of his records and his car. (R.vol. 1, p. 279).

Fanning and two acquaintances of Aucoin, Wilson Abraham and Paul Burke, contacted New Orleans District Attorney Harry Connick in an attempt to secure the release of Aucoin's property. Id. Connick secured the release of copies of Aucoin's records. (R.vol. 1, p. 280). After receiving copies of his records, Aucoin allegedly used these records to pay and collect gambling debts. Id. Subsequently, Aucoin, Connick, Fanning, Abraham, Burke, Condon and Bertolino were indicted under 18 USC 1955 and 18 USC 1962, as were two other persons, Iris Ethridge and Darlene Toca. (R.vol.1, p. 276).

It was alleged that Aucoin, Bertolino, Condon, Ethridge, and Toca constituted a RICO enterprise and a 18 USC 1955 gambling business. (R.vol. 1, pp. 278-281). It was alleged that by attempting to secure the return of Aucoin's property, defendants Connick, Fanning, Abraham and Burke had aided and abetted a racketeering enterprise in the collection of unlawful debt in violation of 18 USC 1962, and had aided and abetted in the operation of a gambling business in violation of 18 USC 1955. (R.vol. 1, pp. 278-281).

Discovery requests by defendants revealed that the predicate crime for the RICO count was Louisiana Revised Statute 14:90 (R.vol. 2, pp. 422, 347). La.R.S. 14:90 is a state misdemeanor gambling statute. La.R.S. 14:90 had also been named in the indictment as the predicate crime for Count 2 of the indictment, the 18 USC 1955 Count. (R.vol. 1, p. 280-281).

Defendants were tried by jury in the United States District Court for the Eastern District of Louisiana, Honorable Marcel Livaudais, Jr., Judge. Petitioners were found guilty on both Count 1 and Count 2 (R.vol. 8, pp. 2125, 2128). Connick, Fanning, Abraham, and Burke were found not guilty (R.vol. 8, p. 2128).

Aucoin was sentenced to 15 months in prison as to Counts 1 and 2, to run concurrently. (R.vol. 9, p. 2576). Condon and Bertolino were each sentenced to 6 months in prison to run concurrently. (R.vol. 9, pp. 2577-2578). Iris Ethridge and Darlene Aucoin Toca Peake accepted plea agreements. (R.vol. 7, pp. 1928, 1933).

Petitioners appealed their conviction under both counts, and also appealed the denial of various motions made before, during and after trial.

The United States Fifth Circuit Court of Appeals (hereinafter the "Appeals Court") affirmed the convictions and denied a rehearing. This appeal was taken pursuant to 28 USC Section 1291 which states that: "The Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States." Petitioners, then, applied for writs to the present Court.

REASONS FOR GRANTING THE WRIT

I. BOTH THE RICO CONVICTION AND THE 18 USC 1955 CONVICTION WERE PREDICATED ON A STATE MISDEMEANOR GAMBLING STATUTE THAT DOES NOT CRIMINALIZE BOOKMAKING, GAMBLING DEBT COLLECTION OR PAYMENT AND WHICH DOES NOT IDENTIFY THE ELEMENTS OF AN ILLEGAL GAMBLING BUSINESS.

Petitioner's basic argument is that criminal statutes should not be interpreted in ways that increase the ambiguity and vagueness of the statutes, or in ways that increase the penalties imposed by statutes without clear justification, or in ways that violate the notice requirement of due process (R. Petitioners' main Appellants' Brief,

pp. 8-31). McBoyle v. U.S., 283 U.S. 25, 27, 51 S.Ct. 340, 341 (1931).

Petitioners also argue that when federal statutes, such as RICO and 18 USC 1955, use local or state predicate offenses to define essential elements of the federal offenses, these local or state statutes must clearly define the elements that constitute the offense. A state or local statute that criminalizes the business of gambling must clearly spell out the elements that constitute an illegal gambling business (for purposes of 18 USC 1955), and the elements that constitute unlawful debt collection under local or state law (for RICO purposes) (R., main Appellants Brief, pp. 8-31).

In the case at bar, the Government based both its RICO violation and its 18 USC 1955 violation on a Louisiana misdemeanor gambling statute, Louisiana Revised Statute 14:90, which does not specifically criminalize "unlawful" gambling debt collection (for RICO purposes) and which does not define the elements of a gambling business (for 18 USC 1955 purposes), and which does not specifically criminalize bookmaking. (Petitioners' Appellants' Brief, pp. 25-31; Appellants' Reply Brief, p. 2-13; Appellees' Brief, pp. 16-17, note 2; R.vol. 1, p. 281). (Note hereinafter references to the Indictment will be abbreviated "Indict.".

References to the Trial Judge's Ruling on Motion To Suppress will be "RMTS." References to the Government's Appellees' Brief will be abbreviation "Aee.Br." References to the Fifth Circuit's Reasons for Judgment will be abbreviated "RFJ").

At the time of Petitioners' trial, La.R.S. 14:90 stated, in pertinent part, that:

> (A) Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit. (West 1986).

Although La.R.S. 14:90 will be discussed in more detail infra, a literal reading of that statute neither identifies the elements of a gambling business nor criminalizes gambling debt payment or collection. Moreover, as bookmakers, Petitioners did not conduct any game, contest, lottery or contrivance. They simply placed bets in the name of their customers on existing events, i.e., football games, etc. Consequently, Petitioners committed no crime sufficient to serve as the predicate for either the RICO or the 18 USC 1955 conviction.

II. THE RICO STATUTE CANNOT BE INTERPRETED SO AS TO CREATE NEW SUBSTANTIVE CRIMES.

In United States vs. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983), cert. denied 465 U.S. 1005, 104 S.Ct. 996, 79 L.Ed.2d 229 (1984), cert denied 474 U.S. 994, 106 S.Ct. 406, 88 L.Ed.2d 357 (1985), the United States Fifth Circuit Court of Appeals stated that:

> RICO's purpose is "the imposition of enhanced criminal penalties and new civil sanctions to provide new legal remedies for all types of organized criminal behavior, that is, enterprise criminality--from simply political corruption to sophisticated whitecollar crime schemes to traditional Mafia type endeavors." RICO does not, however, criminalize conduct that was legal before its enactment. Its application depends on the existence of racketeering activity violating some other criminal statute, state or federal. Id. at 1330 (citations omitted).

However, in the case at bar the RICO statute has been interpreted so as to create a new type of substantive crime, i.e., "unlawful" debt collection. Specifically, the RICO statute makes use of the phrases "pattern of racketeering" and "collection of unlawful debt" to define criminal activity that can be used to trigger the RICO statute, assuming all the other elements of the RICO statute are satisfied. See 18 USC 1962. The crimes listed under 18 USC 1961(1) and (6) are usually referred to as RICO predicate crimes or predicate offenses. Because 18 USC 1961 is entitled the "Definition" section of the RICO statute, one would expect that the purpose of 18 USC 1961 is merely to simplify the reading of the RICO statute by condensing lengthy passages into simple words and phrases.

One would not expect that the definitional provisions of a statute could be used to create new substantive crimes. For example, the phrase "pattern of racketeering" as defined by 18 USC 1961(1) obviously does not create a new substantive crime entitled a "pattern of racketeering," a crime existing separate and apart from RICO.

However, the phrase "unlawful debt" as defined by 18 USC 1961(6) creates a problem. The use of the word "unlawful" is

unfortunate. In the decision of the Appeals Court in the case at bar, the Court speaks as if "unlawful" debt collection were a crime in and of itself, as if the word "unlawful" used in the definitional section of RICO was sufficient in itself to create a new species of substantive crimes, i.e., new species of "debt collection" crimes. (R. RFJ, pp. 7-12, 22-23).

However, in point of fact, not only does the phrase "unlawful debt" define but a single element of a possible crime (a possible RICO violation) but the phrase "collection of unlawful debt" by its own terms does not criminalize debt collection.

By inserting the definitional section of RICO (18 USC 1961) into a substantive RICO provision (such as 18 USC 1962(c)) a literal reading of the RICO statute is obtained. RICO states that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of a debt

> incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof . . . . and which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof . . . .18 USC 1962(c) and 18 USC 1961(6) (emphasis added).

Under a literal reading of the RICO statute, a single element of the RICO statute is satisfied by the collection of debt arising from illegal gambling activity and in connection with an illegal gambling business. Id.

Under a literal reading of RICO, it is clear that RICO does not criminalize the collection of "unlawful" debt, rather, RICO defines the phrase "unlawful debt" collection as the collection of debts that arise from a gambling business that violates local, state or federal law. Consequently, it is not the debt or the collection that is unlawful. It is the activity from which the debt arose that is unlawful. (18 USC 1961(6)).

Moreover, under any conceivable interpretation of the RICO's debt collection prong, that statute states a crime only when an individual associates, with a RICO enterprise and participates in the affairs of the enterprise through the collection of a debt that is incurred or contracted in gambling activity that violate local, state or federal law, and in connection with the business of gambling in violation of local, state or federal law. 18 USC 1962(c); 18 USC 1961(6). For example, if no RICO enterprise is alleged or proven to exist that there is no crime alleged or proven at all because the RICO debt collection prong refers not to crimes, but only refers to consequences that may arise from illegal gambling, i.e. "debt collection." 18 USC 1961(6) only makes reference to whether gambling activity and a gambling business, is illegal under local, state or federal law, not to whether the "debt collection" is a crime in and of itself. Consequently, there is no such crime as "collection of unlawful debt" derived from the RICO statute. If such a crime exists, it must be based on some other provision of local, state or federal law because defining how words and phrases are to be used in reading a statute does not create new crimes.

In the case at bar, the Appeals Court failed to recognize that there is no such crime as "unlawful debt" collection, just as there is

no such crime as a "pattern of racketeering." Both the phrases, "unlawful debt" and "pattern of racketeering," are simply "terms of art" intended to simplify the reading of the RICO statute. Neither of these phrases were intended to create entirely new crimes in and of themselves.

III. THE RICO STATUTE CANNOT BE INTERPRETED SO AS TO CREATE ITS OWN PREDICATE CRIMES.

There is, however, another problem with the RICO debt collection prong. By a literal reading of the RICO statute, the debt collection prong creates its own predicate "crime". As previously discussed the definition of unlawful debt provided by 18 USC 1961(6) makes reference to debts that arise from illegal gambling activity and an illegal gambling business.

However, the fact that gambling activity is illegal and that a gambling business is illegal does not imply that the collection of debt arising from an illegal gambling business is a crime in and of itself. When gambling debt collection is not a crime under some other provision of local, state or federal law, the RICO statute has literally created its own predicate "crime". In such circumstances, a penalty enhancement statute (RICO) is being used to create a new

substantive offense because an individual can be charged with a RICO violation even though he has committed no predicate crime. For example in the case at bar, defendants Connick, Fanning, Burke, and Abraham were charged with a RICO debt collection violation and a 18 USC 1955 violation even though they engaged in no acts of illegal gambling (Indict. pp. 1-9). Under La.R.S. 14:90 (A) they did not conduct or directly assist in any game, etc. in which there was a risk of loss, etc. Id. Petitioners neither conducted any game, etc., nor engaged in any debt collection or payment criminalized by La.R.S. 14:90. (Indict. pp. 1-9).

In these instances the RICO statute is again being used to criminalize behavior that was not illegal before RICO's enactment. Again the RICO statute is being used to create a new species of "crimes".

However, these "crimes" are not offenses which exist separate and apart from the RICO statute, rather these "crimes" exist solely by virtue of a literal reading of the RICO statute, and these "crimes" serve only to create a new type of predicate offense for RICO purposes. 18 USC 1961(6); 18 USC 1962.

Indeed, because a RICO enterprise need not be an illegal business, [United States v. Turkette, 452 U.S. 576, 580-581, 101

S.Ct. 2524, 2527, 69 L.Ed.2d. 246 (1981)] a literal reading of the RICO debt collection provisions, leaves that RICO prong entirely void of any criminal conduct whatsoever.

It must be emphasized that such an interpretation of the RICO statute applies only to the RICO debt collection prong not to the RICO pattern of racketeering prong. In essence, the debt collection prong is fundamentally different from the racketeering prong, because the racketeering prong refers to actual crime, often by statute name and number, 18 USC 1961(1). The racketeering prong makes no reference to consequences that may flow from illegal activities, consequences that may or may not be crimes or elements of crimes in themselves, i.e., debt collection that arise from an illegal gambling business. 18 USC 1961(6).

It is the debt collection prong's reference to consequences of criminal activity rather than to actual crimes that make the debt collection prong so objectional as a criminal statute.

In the case at bar, the Government relied on a literal reading of the RICO "debt collection" prong, (R. Aee.Br. at 13, 24) and the Appeals Court accepted such an interpretation. (R. RFJ, pp. 7-9). Therefore, the Appeals Court erroneously accepted the theory that

RICO can create an entirely new substantive crime, i.e., gambling debt collection in association with a RICO enterprise.

IV. STATUTES THAT CRIMINALIZE THE BUSINESS OF GAMBLING DO NOT NECESSARILY CRIMINALIZE THE PAYMENT AND COLLECTION OF GAMBLING DEBTS.

A. Elements Of A Crime Are Not Necessarily Crimes In Themselves.

Of course, the use of the RICO statute to create new substantive offenses is avoided if the Government is able to charge and convict a defendant of a violation of a state or federal gambling statute or a municipal gambling ordinance that criminalizes the collection of debt that arise from an illegal gambling business. Unlike the gambling activity that can trigger the pattern of racketeering prong (See 18 USC 1961(1)) the debt collection prong does not specifically require multiple felony gambling offenses, but can apparently be triggered by a simple violation of a misdemeanor gambling statute (See 18 USC 1961(6)).

However, neither the Government nor the Appeals Court has cited any statute or ordinance that specifically criminalizes the collection of debt that arise from an illegal gambling business.

Instead the Government and the Appeals Court relied upon a "logical" theory of criminal law which, if accepted as valid, would eliminate many of the problems associated with the RICO debt collection prong.

Specifically, the Appeals Court relied upon the theory that statutes that criminalize the business of gambling (including La.R.S. 14:90 and 18 USC 1955) must logically criminalize the settling of wagering accounts, i.e., the payment and collection of gambling debt, as a necessary part of any gambling business. (R. Aee.Br. at 27, note 8, 29; RFJ at 17, 23).

Among the problems with this theory of criminal law is that it is not only based on a logical fallacy, but it is flatly contradicted by a literal reading of the Louisiana statute relied upon by the Government as the state law predicate crime for both the RICO violation and the 18 USC 1955 violation. This "logical" theory is also contradicted by other Louisiana statutes and case law interpreting gambling offenses and activity.

The Appeals Court argued that essential parts of a gambling business are crimes in themselves. (R. RFJ, p. 17). However, the RICO statute stands for the exact opposite conclusion. For example, a RICO enterprise is an essential part of a RICO violation.

However, persons who merely operate a RICO enterprise, as defined by 18 USC 1961, have not necessarily committed any crime. There is no requirement that a RICO enterprise be an illegal organization even though it is an essential part of a RICO violation. Turkette, supra, 452 U.S. at 580-581, 101 S.Ct. at 2527.

Moreover, a RICO violation does not occur unless all the elements of the RICO statute are satisfied, not simply one essential part. 18 USC 1962.

Consequently, there is no support for the theory that all essential parts of a crime are crimes in themselves.

B. A Literal Reading Of La.R.S. 14:90 Reveals That The Payment And Collection Of Gambling Debt Are Not Elements Of La.R.S. 14:90.

As previously mentioned, at the time of Petitioners' trial La.R.S. 14:90 stated in pertinent part, that:

> (A) Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit. (West 1986).

Under a literal reading of La.R.S. 14:90, the crime is complete when the thing of value is placed at risk, i.e., when the bet is made. At that point an arrest can be made because the statute requires nothing more. The consequences of the bet, the gain or loss, is not dealt with by La.R.S. 14:90. Therefore there is no support for the theory that the payment and collection of gambling debt are criminalized by La.R.S. 14:90. Yet the Government relied exclusively on La.R.S. 14:90 as the predicate state crime for both the RICO and the Gambling violation. See supra.

C. Louisiana Statutes And Case Law Clearly Distinguishes Between Acts of Gambling And Consequences That Arise From Acts of Gambling.

Not only does La.R.S. 14:90 provide no support for the theory of the Government and the Appeals Court, but other Louisiana statutes and Louisiana case law clearly demonstrate that Louisiana law distinguishes between acts of gambling, and consequences that arise from acts of gambling, i.e., the gain or the loss. Although La.R.S. 14:90 criminalizes gambling, other statutes and case law deal with the consequences of gambling.

Louisiana Civil Code Article 2983 provides

> "The law grants no action for the payment of what has been won at gaming or by a debt, except for games tending to promote the skill and the use of arms, such as the exercise of a gun and foot, horse and chariot racing.
>
> And as to such games, the Judge may reject the demand, when the sum appears to him excessive." (West 1952).

Louisiana Civil Code Article 2984 provides:

> "In all cases in which the law refuses an action to the winner, it also refuses to suffer the loser to reclaim what he has voluntarily paid, unless there has been, on the part of the winner, fraud, deceit, or swindling." (West 1952).
>
> "Courts will not render assistance to a litigant to enforce a gambling obligation. Domino v. Louisiana Board 99 So.2d 841, 843 (La. App. 1 Cir. 1957).

> "The loser of a gambling debt cannot claim what he has voluntarily paid unless there has been, on the part of the winner, fraud, deceit or swindling. McGlatchey v. Guarantee Bank & Trust Co., 228 La. 1103, 85 So.2d 6, 8 (La. 1955).

Louisiana law appears to differentiate the risk itself, from the consequences of the risk, i.e., the loss or gain.

Although Louisiana law will not give a gambling creditor (such as a bookmaker) a legal action against his debtor, except in specific circumstances, neither will it assist a gambling debtor in recovering his money unless he can show fraud, deceit or swindling on the part of the creditor. See Louisiana Civil Code article 1761. (West 1987). (R.vol. 9, pp. 2771-2772).

Moreover, there is no provision of Louisiana or federal law that criminalizes the collection of gambling debts, just as there is no provision of Louisiana or federal law that criminalizes the payment of gambling debts, or that prevents one person from honoring a natural obligation by paying debts that have prescribed or debts that have been extinguished in bankruptcy. RICO was not intended to punish people who merely expect others to keep their word or honor

their voluntary commitments. See Louisiana Civil Code Article 1761 and 1762. Unless the Government can point to a state or federal statute that criminalizes the collection of gambling debts, the Government has created a new crime out of what is nothing more than a natural obligation, i.e., most gambling debts cannot be legally enforced in Louisiana. See Louisiana Civil Code articles 1760 et seq (West 1987).

Moreover, a contract to perform a natural obligation (such as a debt extinguished in bankruptcy or a gambling debt) is legally enforceable under Louisiana law (see Louisiana Civil Code article 1761).

Yet if the collection of gambling debts is not an element of a local or state gambling offense, and is sometimes legally enforceable under state law, a truly absurd situation is created: the legal enforcement of a debt that arises from gambling activity that violates state law is in itself criminalized under RICO. Consequently, a judge who ruled that under Louisiana law, a gambling debtor had a natural obligation to pay gambling debts that stemmed from an illegal gambling enterprise, could himself be prosecuted under RICO because he willfully and knowingly aided in the collection of debts that arose from an illegal gambling enterprise. If such a scenario

seems farfetched consider that district attorney Connick was indicted under RICO for what amounted to the providing of early discovery to Aucoin. See 18 USC 1961(6). (Indict. pp. 6-8). Connick certainly knew that Aucoin, as a well known bookmaker, would use copies of his records in his gambling business, just as a judge who enforces a gambling debt arising from an illegal gambling business knows that he is aiding an illegal gambling business.

Consequently, not only is the Government's "logical" theory of criminal law reputated by logic, statutes and case law, but it results in absurd consequences.

V. THE DECISION BELOW REVEALS THAT THE RICO STATUTE IS NOW UNCONSTITUTIONALLY VOID FOR VAGUENESS ON ITS FACE AND AS APPLIED IN THE PRESENT CASE VIS-A-VIS GAMBLING OFFENSES.

A. Criminal Penalties Cannot Differ Solely On The Basis Of Whether The Same Activity Is Called Gambling or Debt Collection.

Because gambling offenses almost always involve an exchange of money, under the Government's theory any statute or ordinance that criminalizes the business of gambling can be converted into a RICO debt collection violation. All that is required is "association" with a two person illegal gambling enterprise, and "participation" by the collection of a single gambling debt.

Indeed, under the Government's theory, all the RICO requirements are met by the definition of unlawful debt as provided by 18 USC 1961(6). The collection of debt incurred or contracted in illegal gambling activity and in connection with a two person illegal gambling enterprise satisfies the "enterprise" requirement of RICO, the "debt collection" requirement of RICO, the "association" requirement of RICO and the "participation" requirement of RICO. See 18 USC 1962.

In the case at bar, a state misdemeanor gambling statute (La.R.S. 14:90) also satisfies all the requirements necessary for a RICO debt collection violation. In other words, La.R.S. 14:90, despite the fact that it makes no mention of the payment and collection of gambling debt, can trigger the RICO debt collection prong as long as one debt arising from an illegal gambling business

is collected (Compare La.R.S. 14:90 with 18 USC 1961(6) and 18 USC 1962).

Even more important, no actual violation of La.R.S. 14:90 is required. In the case at bar defendants Connick, Fanning, Burke and Abraham did not violate La.R.S. 14:90 (Indict. pp. 1-9). See supra. They allegedly aided and abetted in the collection of debt arising from alleged violations of La.R.S. 14:90. (R.vol. 1, pp. 276-280, vol. 2, pp. 422, 347. Aee Br., pp. 16-17, note 2).

Indeed, the Government has admitted that it believes that a person can be convicted under RICO even though it cannot be proved that he violated any local, state or federal law. (R.vol. 3, pp. 836-837). The Government has also stated that it believes that a two person business can satisfy the RICO enterprise requirement (R.vol. 3, pp. 833-834).

Under the Government's reasoning, count 2 of the indictment could have been left out altogether, and the Government could still have been able to indict all the defendants under RICO because the Government never alleged that violations of 18 USC 1955 were the predicate crimes upon which the RICO count was based. Indeed, the Government said just the opposite. (R.vol. 1, pp. 277-280, vol. 3, pp. 843-844, vol. 5, pp. 1239-1240).

On the other hand, a violation of La.R.S. 14:90 could never serve as the predicate crime for the RICO racketeering prong. Moreover, there is no conceivable way in which non criminal conduct (the collection of gambling debt arising from a violation of La.R.S. 14:90) could trigger the racketeering prong because 18 USC 1961(1) requires actual crimes. Indeed, multiple convictions and felony offenses are necessary to keep the RICO statute internally consistent because the racketeering prong rejects the use of misdemeanors as predicate crimes for a RICO conviction, U.S. v. Welch, 656 F.2d 1039, 1059 (5th Cir. 1981); U.S. v. Davis, 576 F.2d 1065, 1067 (3rd Cir.) cert. denied, 439 U.S. 836 (1978); U.S. v. Tunnell, 667 F.2d 1182, 1185 (5th Cir. 1982).

Moreover, the racketeering prong requires at least two felonies to establish a pattern of racketeering. See e.g., Cowan v. Corley, 814 F.2d 223, 226-27 (5th Cir. 1987) reading Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), to "direct a narrower definition of pattern than has been sometimes employed" and noting that the district court "correctly concluded that two illegal acts will not constitute a RICO pattern in every instance"); Delta Truck & Tractor, Inc. v. J. I. Case Co., 855 F.2d 241, 243 (5th Cir. 1988) cert. denied _____ vs.

_____, 109 S.Ct. 1531 (1989) (two acts necessary but may not be sufficient) (quoting Sedima, 473 U.S. at 496 n. 14, 105 S.Ct. at 3285, n. 14.

Consequently, the RICO statute is now unconstitutionally void for vagueness because identical activity is treated entirely different depending on whether the Government call the activity gambling or debt collection. Specifically, the Government has repeatedly argued that the elements necessary for conviction of RICO is entirely different depending on whether the same activity is characterized as a pattern of racketeering or as the collection of "unlawful" gambling debt (R.vol. 3, pp. 843-844 vol. 5 pp. 1239-1240).

B. RICO Gambling Debt Collectors Should Not Be Penalized More Severely Than Owners Of Illegal Gambling Business.

Moreover, Petitioners pointed out that under the Government's interpretation of the RICO debt collection prong, the collection of a gambling debt arising from an illegal gambling business (an activity that may not be illegal in itself under any local, state or federal law) was being punished more severely (as a RICO

violation) than an entire illegal gambling business under 18 USC 1955. (R.App. Br., pp. 19, 24-26).

However, by reading 18 USC 1961 and 1962 in pari materia with 18 USC 1955, a violation of the debt collection prong of RICO should normally be punished less severely than the 18 USC 1955 violation. Both the RICO and the gambling violation require an enterprise, i.e., a gambling business. However, 18 USC 1955 requires a large gambling business. There is no such requirement for a RICO enterprise. (R.vol. 3, pp. 833-834).

Moreover, any illegal gambling activity would presumably require the payment and collection of gambling debts. Consequently the Government is attempting to punish one aspect of the gambling business (the collection of gambling debts) more severely than the entire gambling business (under 18 USC 1955). Logically a gambling business may sometimes become large enough to violate RICO, but a RICO violation cannot be found within one aspect of a local or state gambling offense. The absurdity of such a consequence is seen in the sentencing guideline.

Under the Government's reasoning the collectors of gambling debts would be punished under a base level of at least 19 under RICO, yet the owner of an illegal gambling business who

made sure that he played no part in the collection of gambling debts could be punished at a base offense level of 12 under 18 USC 1955. The kingpins of gambling would be punished less severely than the persons they hired to collect their gambling debts. (Compare 2E 1.1 pg. 87 with 2E 3.1, pg. 91, Federal Sentencing Guidelines Manual, 1990 Edition).

Furthermore, Petitioners pointed out that to interpret the RICO statute as alleged in the indictment would make 18 USC 1955 superfluous. That is, if an individual can be indicted under RICO for the collection of one gambling debt, the requirements for an indictment under 18 USC 1955 are negated. All that need be alleged is "association" with a two person illegal gambling enterprise, and "participation" through the collection of a single gambling debt (or simply aiding and abetting in the collection of gambling debts as was alleged in the indictment in the present case as to defendants Connick, Burke, Fanning and Abraham) (R.vol. 1, pp. 276-280).

The reason why the RICO statute must now be recognized as unconstitutionally void for vagueness, is that not only is the RICO statute internally inconsistent, but it conflicts with the gambling statute, 18 USC 1955. The gambling statute is listed as a predicate crime for the RICO pattern of racketeering prong.

However, the Government's use of the RICO unlawful debt collection prong, make it apparent that a RICO violation is a lesser included offense within a gambling statute violation. A RICO violation can consist of a two person enterprise and a single act of debt collection. See supra.

Moreover, the Justice Department's attempt to create new crimes from statutory ambiguity, and without a clear congressional mandate violates the principles of separation of power. (R., App.Br., pp. 50-52).

C. It Is Logically Absurd To Believe That Congress Intended To Punish Non Criminal Behavior More Severely Than Multiple Felonies.

In response to Petitioners' arguments, the Government responded by saying that the general principles formulated by Courts interpreting the RICO statute were developed only in relation to the "racketeering" prong, and have application only to that prong, not to the "debt collection" prong. (R.vol. 3, pp. 843-844, vol. 5, pp. 1239-1240). This argument was accepted by the Appeals Court (R. RFJ, pp. 11-17).

Moreover, the Government and the Appeals Court accepted the theory that Congress intended to punish the collection of

gambling debts more severely (under RICO) than an entire gambling business (under 18 USC 1955) (Acc.Br. at 26; RFJ at 13-17).

In response to such arguments Petitioners must first point out that neither the Government nor the Appeals Court cited any authority to support the belief that Congress intended to punish the collection of a debt arising from an illegal gambling business or enterprise (under the RICO debt collection prong) to the same degree as it punishes two or more felony gambling offenses in association with a RICO gambling enterprise (under the RICO racketeering prong).

Petitioners also must point out that neither the Government nor the Appeals Court cited any authority to support their argument that Congress intended to punish the collection of a debt that arises from an illegal gambling business (under the RICO debt collection prong) more severely than an entire gambling business under 18 USC 1955.

However, Petitioners' main argument is based on the fact that Louisiana law does not criminalize gambling debt collection (See supra) and that the Government has admitted on the record in the present case that it believes that persons can violate RICO even

though they have violated no local, state or federal law (R.vol. 3, pp. 836-837).

It is simply absurd to believe that Congress intended to punish an individual's non criminal gambling debt collection behavior in association with a RICO enterprise more severely than it punishes owners of an illegal gambling business, and as severely as it punishes individuals who commit multiple felonies in association with a RICO enterprise, including the felonies of murder, kidnapping, arson, robbery, bribery, extortion and drug dealing. 18 USC 1961 (1).

Therefore the RICO statute is unconstitutionally void for vagueness vis-a-vis gambling and gambling debt collection offenses.

VI. THE VAGUENESS AND AMBIGUITY OF THE RICO STATUTE IS REVEALED BY THE APPEALS COURT'S ANALYSIS.

In addition to the general grounds for vagueness previously discussed, Petitioners also argue that the RICO statute is now so ambiguous and confusing that it cannot be analyzed in any comprehendible way.

Indeed, the analysis by the Fifth Circuit reveals this very fact. On page 17 of its decision the Appeals Court states that:

> Appellants knew they were operating a bookmaking business in violation of Louisiana law and admitted as much at trial. Their assertion that "[t]here is no provision of Louisiana or federal law that criminalizes the collection of gambling debts" is incorrect. Section 1955 prohibits the conducting of an illegal gambling enterprise and La.Rev.Stat. 14:90 penalizes the conducting of a gambling business. The collection of money owed on wagers is an essential part of the gambling business. (RFJ at 17).

Yet on page 23, the Appeals Court in analyzing the double jeopardy issue, states that:

> The elements of the statutes differ. The gambling statute requires proof that five or more persons were participating in the business, that the business was in

> substantially continuous operation for 30 days or more, or that the business had gross revenue of $2000 in any single day. 18 USC §1955(b)(1). None of these elements are required to prove a RICO violation. Similarly, RICO requires proof that an enterprise existed, and that the person participated in the conduct of the enterprise through the collection of an unlawful debt. 18 USC §1962(c). Although collection of debts is a necessary part of a gambling operation, debt collection is not a specified element of §1955. (RFJ at 23).

Yet if gambling debt collection is a necessary part of any gambling business (for purposes of 18 USC 1955, and La.R.S. 14:90) or any gambling enterprise (for RICO purposes) than the collection of gambling debt is an element of all three statutes, under such an analysis.

The fact that 18 USC 1955 requires a larger gambling enterprise than the RICO enterprise (a two person enterprise and a

single gambling debt collection) simply means that a RICO debt collection violation is a lessor included offense within any 18 USC 1955 violation. Moreover, under the Appeal Court's analysis, a criminal defendant that operates an illegal gambling business is not protected from double jeopardy because, according to the Court, the collection of debts, although a necessary part of a gambling operation is not a specified element of 18 USC 1955 (RFJ at 23). Of course, this statement, besides recognizing an apparent distinction between a "necessary part" of a gambling business and a "specified element" of a gambling business, is simply not true as a general rule because 18 USC 1955 makes reference to state or local law to define elements of a 18 USC 1955 violation. Consequently, gambling debt collection could be an element of a 18 USC 1955 violation under a particular state or local statute.

VII. 18 USC 1955 IS VOID FOR VAGUENESS AS APPLIED IN THE CASE AT BAR.

Under a literal reading of La.R.S. 14:90, as it existed at the time of Petitioners' trial the Government first had to prove that Petitioners conducted a game in which persons risk the loss of anything in order to realize a profit. La.R.S. 14:90 (A) (West

1986). The Government then had to prove the requirements of 18 USC 1955, five or more persons, etc.

However, a reading of the indictment makes clear that the Government was not relying on the language of a criminal statute, but on its "logical" theory of criminal law. Not only does the indictment not even mention the taking and placing of bets (the activity clearly proscribed by La.R.S. 14:90) but the indictment repeatedly states that Petitioners paid and collected gambling debt (Indict. pp. 1-9) (emphasis added). Yet the payment of gambling debt is not an element of the RICO debt collection prong. 18 USC 1961(6); 18 USC 1962. The payment of gambling debts would be a crime only under the Government's theory that statutes that criminalize the business of gambling must logically criminalize the payment and collection of gambling debts, as essential parts of any gambling business (R.Aee.Br. pp. 27, note 8; 29).

Moreover, as previously discussed La.R.S. 14:90 does not specifically criminalize bookmaking, and does not define the elements of an illegal gambling business for the purposes of 18 USC 1955.

Therefore because there was no statutory predicate for the 18 USC 1955 conviction, 18 USC 1955 is unconstitutionally void for vagueness as applied in the case at bar.

VIII. THE DECISION BELOW VIOLATES PRINCIPLES OF STATUTORY CONSTRUCTION.

Assuming arguendo that the decision below has not rendered both RICO and 18 USC 1955 void for vagueness, that decision clearly has violated principles of statutory construction and the rule of lenity. (R., App.Br., pp. 8-20).

In its decision, the Appeals Court held that the statutes were not vague or ambiguous (R., RFJ, pp. 10-19). The Court also stated that:

> "[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.'" Bifulco v. United States, 447 U.S. 381, 387 100 S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980); Lewis v. United States, 445 U.S. 55, 65, 100 S.Ct. 915, 921, 63 L.Ed.2d 198 (1980). The Supreme Court explained in United States v. Turkette, 452 U.S. 576,

587, 101 S.Ct. 2524, 2531 n. 10, 69 L.Ed.2d 246 (1981), a case in which it declined to apply the rule of lenity to the RICO statute:

> [T]hat "rule," as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one . . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.
>
> "See also, Taylor v. United States, 495 U.S. 575, 596, 110 S.Ct. 2143, 2157, 109 L.Ed.2d 607 (1990) (rule of lenity "cannot dictate an implausible interpretation")." (R., RFJ, pp. 10-11).

In the case at bar, what could be more implausible than to believe that Congress intended to punish non-criminal behavior in

association with a RICO enterprise as severely as multiple felonies in association with a RICO enterprise, and more severely than a 18 USC 1955 gambling business. See supra.

If, as the Appeals Court stated, that Congress intended RICO and 18 USC 1955 to complement each other (R. RFJ, pp. 12-14) that scheme was shattered when the Government chose to use a misdemeanor state gambling statute that does not specifically criminalize gambling debt collection as its RICO predicate.

Because of the decision below, 18 USC 1955 is now sandwiched between the two RICO groups. Under the pattern of racketeering prong of RICO, at least two violations of 18 USC 1955 are necessary to serve as predicate acts for a RICO violation. Under the federal gambling statute at least five persons must be involved in the gambling business. The business must have been in substantially continuous operation for a period in excess of 30 days or has a gross revenue of $2,000 in any single day. Under the RICO unlawful debt collection prong, all that is required is "association" with a two person illegal gambling enterprise, and "participation" through a single act of gambling debt collection. See supra.

Because a RICO violation can be found within any gambling statute violation, and because a RICO violation carries a harsher penalty than a gambling statute violation, the gambling statute is superfluous. It is now simply a trap for an individual, such as Aucoin, who believes that by limiting the size and scale of his gambling operation, he can avoid violating federal law. Instead, such an individual is subjected to the harsher RICO penalty under the Government's interpretation of the unlawful debt prong of RICO. Consequently, there is now no guidance under federal law as to how federal gambling offenses are to be determined.

Moreover, in the present case the Appeals Court stated that Petitioners' "operated an illegal gambling business that handled millions of dollars each year. It involved over 80 bettors in numerous states. More than 15 individuals were associated with the operation business." (R. RFJ, p. 12). If all that is true why didn't the Government use 18 USC 1955 as its predicate crime and the racketeering prong? Was it because defendants Connick, Burke, Fanning and Abraham could not have been indicted and tried for a RICO violation involving multiple violations of 18 USC 1955?

Because violations of 18 USC 1955 are specifically listed as predicate acts for the pattern of racketeering prong, but not for the

unlawful debt collection prong, the Government, in using the debt collection prong, has selected a more general provision of a statute over a more specific provision of a statute.

Rules of statutory construction are violated not only because a more general provision of a statute is selected over a more specific provision, but because the Government's very argument that gambling offenses are to be treated differently under the unlawful debt collection prong has introduced a clear ambiguity into the RICO statute. (R.vol. 3, pp. 843-844, vol. 5, pp. 1239-1240). Busic v. U.S., 446 U.S. 398, 407, 100 S.Ct. 1747, 1753, 64 L.Ed.2d 381 (1980); Bifulco v. U.S., 447 U.S. 381, 387, 100S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980); U.S. v. Tonry, 837 F.2d 1281, 1284 (5th Cir. 1988). When a statute is ambiguous, any ambiguity must be resolved in favor of the defendant. Id.

Moreover, by applying principles of statutory construction to the RICO statute vis-a-vis the gambling statute, it is the RICO conviction that must be thrown out because the gambling statute is more specific and the RICO statute is now ambiguous. See Simpson v. U.S., 435 U.S. 6, 15-16, 98 S.Ct. 909, 914-915, 55 L.Ed.2d 70 (1978); See Busic, supra, 446 U.S. at 407, 100 S.Ct.

at 1753; See also Bifulco, supra, 447 U.S. at 387, 100 S.Ct. at 2252.

IX. THE CONVICTION OF PETITIONERS UNDER BOTH THE RICO STATE AND THE GAMBLING STATUTE WAS TO TWICE PUNISH THEM FOR THE SAME CONDUCT.

In the present case, it could be argued that 18 USC 1961 et seg. requires that gambling activities affect the interstate commerce while 18 USC 1955 does not. However, cases have upheld the constitutionality of 18 USC 1955 on the basis of the fact that it does have an implicit interstate commerce element. See United States v. Harris, 460 F.2d 1041, 1043-47 (5th Cir. 1972) cert. denied, 409 U.S. 877, 93 S.Ct. 128, 34 L.Ed.2d (1972). See United States v. Meese, 479 F.2d 41, 42-43 (8th Cir. 1973).

It should also be noted that the Appeals Court makes a factual error in regard to the double jeopardy issue. The Court states that:

> It is well settled that this clause (the Double Jeopardy Clause) protects against a double prosecution for the same offense. But it is equally well established that a

> defendant may be charged, convicted, and sentenced in the same case for violating a statute and a RICO predicated on that statute. . . . Thus, in the present case, the defendant's reliance on the Double Jeopardy Clause is misplaced. (RFJ at 22-23)(citations omitted).

However, in the case at bar, the Government repeatedly stated that the predicate offense for the RICO charge was La.R.S. 14:90 not 18 USC 1955 (R.vol. 1, pp. 277-280; vol. 3, pp. 843-844; vol. 5, pp. 1239-1240).

Moreover, in the case at bar the conduct was identical. (Indict. 1-9). The same five persons that made up the RICO enterprise also made up the 18 USC 1955 business (Indict. pp. 4, 8). The same persons that collected or aided and abetted in the collection of gambling debt also managed and financed the 1955 business, or aided and abetted in its operation. (Indict. pp. 4-9). The managing and financing of the 1955 business would obviously include the collection of gambling debts (Indict. pp. 4-9).

Of course, the fact that the 18 USC 1955 violation includes activities other than gambling debt collection, simply means that the

RICO violation is a lessor included offense within the 18 USC 1955 violation. In essence, the RICO offense did not require proof of an additional fact than the 18 USC 1955 offense. Brown v. Ohio, 432 U.S. 161, 166, 97 S.Ct. 2221, 2224-26, 53 L.Ed.2d 187 (1977).

The Appeals Court's attempt to distinguish a "necessary part" of a gambling operation from a "specified element of" 18 USC 1955 (R., RFJ, p. 23) is not only a purely semantic distinction, but, it is a fallacious distinction because La.R.S. 14:90 was the predicate for both the RICO and the 18 USC 1955 prosecution.

Consequently, whether or not La.R.S. 14:90 criminalizes gambling debt payment and collection is irrelevant because whatever La.R.S. 14:90 does, it obviously does it for both RICO and 18 USC 1955 purposes. Consequently the offenses are identical.

X. PETITIONERS' CONVICTION UNDER RICO WAS UNCONTITUTIONAL FOR LACK OF THE FAIR NOTICE REQUIREMENT OF DUE PROCESS.

It is well established that the Government cannot prosecute a citizen for a criminal offense when the controlling law is vague or unsettled. As Justice Holmes wrote, conduct cannot be punished criminally without "fair warning . . . in language that the common

world would understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. McBoyle v. United States, 283 U.S. 25, 27; 51 S.Ct. 340, 341 (1931). The "underlying principle is that no man shall be held criminally responsible for the conduct which he could not reasonably understand to proscribe." United States v. Insco, 496 F.2d 204, 208 (5th Cir. 1974) [quoting United States v. Harris, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954).

The requirement of fair notice mandated in McBoyle rests upon fundamental principles of due process. "Due process requires that a person be given fair notice as to what constitutes illegal conduct so that he may conform his conduct to the requirement of the law. United States v. Dahlstrom, 713 F.2d 1423, 1427 (9th Cir. 1983), cert denied, 466 U.S. 980, 104 S.Ct., 2363, 80 L.Ed.2d 835 (1984). See also Bouie v. City of Columbia 378 U.S. 347, 350, 352, 84 S.Ct. 1697, 1701-1702 (1964).

The testimony and evidence at trial clearly shows that Walton Aucoin went to great lengths to attempt to avoid prosecution for gambling under federal law. To avoid such prosecution, Aucoin obtained the services of an attorney, Patrick Fanning, met with

employees of the Internal Revenue Services and obtained a Federal Gambling Stamp. (R.vol. 27, pp. 7-8, 11-12, 14-20, 33).

The present case involves the relationship between a narrow and precise statute (the gambling statute) and a vague or overbroad statute (the RICO statute). In Bouie, supra, 378 U.S. 347, 84 S.Ct. 1697 the United States Supreme Court analyzed the effects of broad and narrow statutes on the notice requirements of due process:

> When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth

> Amendment is violated when a person is required "to speculate as to the meaning of the penal statutes," as in Lanzetta, or to "guess at [the statute's] meaning and differ as to its application," as in Connally, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question. Id. at 352, 84 S.Ct. 1702.

In the present case, Petitioners' efforts to conform to the precise requirements of 18 USC 1955 lulled them into believing that their activities did not violate federal law.

In essence, Petitioners had no reason to suspect that they could face more severe RICO penalties under the RICO "collection of an unlawful debt" prong even if their gambling activity had not violated 18 USC 1955, or even La.R.S. 14:90. Consequently, the conviction under RICO violated the notice requirements of due process.

XI. THE RECORDS USED BY A GAMBLER TO PREPARE HIS GAMBLING TAX RETURNS CANNOT BE USED AGAINST HIM IN A NON TAX RELATED GAMBLING PROSECUTION.

Petitioners made motions to suppress the gambling records seized from Walton Aucoin because he used these records in the calculation and payment of his gambling returns and taxes (R.vol. 4, pp. 1055-1073, vol. 9, pp. 2716, 2722). In upholding the Trial Judge denial of the motions to suppress, the Appeals Court relied on the Trial Judge's holding that "while (the records) may have assisted [Aucoin] in preparing his tax return, (they) were obviously maintained in addition as the basic business records of his alleged gambling enterprise." (R. RFJ, p. 24). In other words, in denying Aucoin's motion to suppress the introduction of gambling records seized from him the Trial Court stated that Aucoin failed to demonstrate that his records were maintained solely for paying federal gambling tax. (RMTS, p. 3). The Court relied on United States v. King, 834 F.2d 109, 114 (6th Cir. 1987) and United States v. Brian, 507 F.Supp. 761-768-769 (D.R.T. 1981) (R.vol. 7, pp. 2109-2110) (RMTS, p. 3).

Petitioners argue that because the Government compels a bookmaker to prepare and maintain records of his gambling business, because of the Fifth Amendment to the United States Constitution and 26 USC 4401, et seq., it cannot then use such records to convict him of illegal gambling. United States v. Haydel, 486 F.Supp. 109, 114-115 (M.D. La. 1980) cert denied 455 U.S. 1022, 102 S.Ct. 1721, 72 L.Ed. 2d 140 (1982) affirmed 649 F.2d 1152 (5th Cir. 1981).

26 USC 4424 prohibits the use of any tax return or gambling stamp in prosecution for gambling. But the records seized in Haydel were independently discovered without assistance from the IRS. The issue in Haydel was whether the self-incrimination privilege of the Fifth Amendment allows the Government to compel a bookmaker to prepare and maintain records of his gambling business under penalty of prosecution for failure to maintain them, and then use the wagering records to convict him of illegal gambling? The Court said such use is prohibited. Id. at 110-111, 115.

The Haydel decision goes on to distinguish income tax returns which are directed to all taxpayers equally, and wagering tax information which, under the guise of a revenue scheme, directs the

record keeping requirement at a group inherently suspect of criminal activities and then attempts to use the compelled records to prosecute them for nonrevenue scheme violations. Id. at 115.

The District Court in United States v. Brian, 507 F.Supp. 761, 768-69 (D.R.I. 1981) cites Haydel approvingly and makes some modifications. Id. at 768.

The Court in Brian states that:

> "In the thorough and carefully reasoned opinion, the Federal District Court for the District of Louisiana has held that the Government may not use such betting records to convict of gambling a bookmaker who has kept the records because of the statutory mandate. See United States v. Haydel, 486 F.Supp. 109 (D.C. 1980).
>
> This result seems to be thoroughly consistent with, and in fact required by, the reasoning of Marchetti and Grosso. Just as the Government may not compel a bookmaker to obtain a special stamp for tax

> purposes and then present this registration as evidence that he is a gambler, so it may not require him to keep records of compliance to convict him of running a wagering business." United States v. Brian, 507 F.Supp. 761, 768 (D.R.I. 1981), aff'd sup. nom., United States v. Southard, 700 F.2d 1 (1st Cir. 1983).

The District Court in the Brian case expanded the ruling in Haydel to include an inquiry into the motivation of the defendant. However, the motivation of such persons is obviously both to engage in illegal gambling activity and to avoid prosecution for tax evasion. Consequently the Government would always find one legitimate motive and one suspect motive and would always be able to justify use of the IRS records in gambling prosecution in all instances. This is also why the present Court should reject the Trial Court's holding that Aucoin had the burden of proving that he maintained his records solely for tax purposes. (RMTS, p. 3) (emphasis added). Such a burden is unrealistic for an individual who admits to the Government that he engages in illegal gambling activity. Haydel, supra, 486 F.Supp. at 115.

However, assuming arguendo that the present Court accepts the reasoning of Brian, that case is not truly opposed to the case at bar, it merely requires that the Court determine a defendant's relative motivation. Brian, supra, 507 F.Supp. at 768-769.

The Court in Brian even developed a standard to determine relative motivation:

> In these circumstances, I think the appropriate procedure is as follows. Defendant must initially come forward with some evidence that he kept the seized records because of the statutory mandate. Specifically, he should produce evidence of his compliance with other provisions of the wagering tax laws. Once defendant has made this showing, the Government bears the burden of proving that Section 4403 was not the motivating force for the records keeping. Id. at 769.

In the case at bar there was submitted at trial and before, concrete evidence that Aucoin; (1) knew of the IRS statutes mandating record keeping and reporting requirements of person

deriving income from wagering, (2) hired an attorney, Patrick Fanning, to ascertain more clearly the requirements of the IRS statutes, (3) met with officers and employees of IRS in order to insure his compliance with IRS statutes, (4) obtained a federal Gambling Stamp, filed income reports, and paid taxes on his wagering income. (R.vol. 27, pp. 7-8, 11-12, 14-20, 33).

If Aucoin had merely prepared his wagering records and documents so as to maintain a personal record of his gambling debtors and creditors, he would have had no reason to undertake the costly and time consuming efforts required to conform to IRS regulations. Consequently, Brian would require the suppression of the gambling records and data in the present case. Brian, supra, 507 F.Supp. at 769.

Moreover, according to the indictment and the evidence at trial; it was only after the records were seized that Aucoin allegedly realized that his bookmaking activities could not continue without his records. Indeed, the indictment does not even allege that Aucoin used his records to pay and collect gambling debts until after Aucoin was arrested and his records seized. (Indict. pp. 1-9).

Therefore, under the reasoning of Brian, Aucoin's records should have been suppressed because Aucoin's motivation for

maintaining the records was to comply with the law. 507 F.Supp. at 768. After Aucoin was arrested and his records were seized, Aucoin was no longer maintaining them. Yet the Trial Court cited Brian as authority for denying Aucoin's motion to suppress. (R.vol. 7, 2109-2110) (RMTS, pp. 2-3).

In United States v. King, 834 F.2d 109 (Cir. 1987) cert. denied 485 U.S. 1022, 108 S.Ct. 1576 (1988) the Court made a statement in dicta to the effect that betting sheets could be admitted into evidence without violating the defendant's Fifth Amendment privilege against self-incrimination. Id. at 114.

Yet the Trial Court relied on this data to deny Petitioners' motion to suppress. (R.vol. 7, pp. 2109-2110) (RMTS, pp. 2-3).

Moreover, as Condon and Bertolino were alleged to be mere employees of Aucoin, they should have been afforded the same Fifth Amendment privilege as Aucoin. In essence, by conforming to Internal Revenue rules and regulations, Aucoin was attempting to insure that his bookmaking business did not violate federal law. Therefore, employees of Aucoin's business should be entitled to claim the same privilege as Aucoin. 26 USC 4412 (a)(2).

XII. THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE DID NOT APPLY.

Walton Aucoin and Pat Fanning joined in a Motion To Suppress Wiretaped Conversations based on the attorney-client privilege (R.vol. 3, pp. 651-657). The Appeals Court held that the Trial Court was correct in concluding that the attorney-client privilege did not apply because of the crime-fraud exception (R. RFJ, pp. 19-20). Specifically in denying, Aucoin and Fanning's Motion To Suppress Wiretaps based on the attorney-client privilege, the Trial Judge held that the privilege did not apply because Aucoin and/or Fanning were using the attorney-client relationship to further illegal activity (R.vol. 7, pp. 2113-2114) (RMTS, pp. 7-9).

Succinctly, the crime-fraud exception generally states that if the attorney-client communication is in furtherance of a crime, such communication does not fall within the privilege.

The problem is identifying the crime that was furthered. The Government never alleged that Fanning participated in an illegal gambling operation operated by Aucoin by helping to place or take bets. Rather, the Government alleged Fanning helped Aucoin by

attempting to assist Aucoin in retrieving his car and gambling records which had been seized. (Indict. pp. 6-8).

Aucoin, of course, needed the records to settle up his past accounts. He could have begun keeping new records to keep track of his bookmaking activities subsequent to his arrest. However, as previously discussed, Louisiana law does not criminalize such conduct. See supra.

In Louisiana, the crime of gambling, i.e., receiving and placing the bets, would have occurred and been complete prior to Aucoin's attempts to have copies of the bookmaking records returned to him. Consequently, Aucoin's attempts to secure the return of the records did not facilitate the commission of a crime under Louisiana law because the crime had already been completed when the thing of value had been placed at risk. Therefore, the crime-fraud exception does not apply, and the attorney-client wiretaps should have been suppressed. See La. R.S. 14:90.

XIII. THE GOVERNMENT'S USE OF THE RICO STATUTE IN CONJUNCTION WITH THE GAMBLING STATUTE IN THE PRESENT CASE SO CONFUSED THE JURY THAT PETITIONERS WERE DENIED A RIGHT TO A FAIR TRIAL.

The jury in a criminal case is expected to determine a defendant's guilt beyond a reasonable doubt. However, the Government's argument that a single element of an illegal gambling business (the collection of gambling debt) required a less rigorous burden of proof (association and participation through a single act of debt collection) yet was punished more severely (as a RICO violation) than the entire gambling business (under 18 USC 1955), would create confusion in the mind of any reasonable person. Therefore, the jury was incapable of determining Petitioners' guilt beyond a reasonable doubt, and Petitioners were denied a right to a fair trial.

CONCLUSION

The Government, in the case at bar, based its theory of the case on "logic" rather than on statutes and case law. This "logical"

theory of criminal law is clearly seen in the section of the indictment titled "Participation Of The Defendants." (Indict. pp. 6-8).

The indictment focuses on the attempts of the defendants to aid Aucoin in the payment and collection of gambling debts, activities not even mentioned by La.R.S. 14:90. (Indict. pp. 1-9).

Such a "logical" theory made it possible for the Government to indict and try individuals for RICO violations even though they clearly engaged in no acts in violation of La.R.S. 14:90 (defendants Connick, Burke, Fanning and Abraham).

The arguments regarding the other defendants has application to Petitioners in that even though Petitioners are admitted bookmakers they did not choose the statutes under which they were convicted, and they did not choose the theory of law upon which the Government based its case. The Government failed to recognize that no Louisiana or federal statute criminalizes the payment and collection of debt that arise from an illegal gambling business (App.Br. at 25-31). The Government also failed to recognize that no Louisiana statute defines the elements of an illegal gambling business. Id. and App.R.Br. at 1-13.

The Government gambled on a new theory of criminal law, one based on logic rather than statutes and case law. However,

because there was no statutory basis for either conviction, both convictions should be reversed.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted:

_____

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Bar #4898

IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term, 1992

No. _____

WALTON AUCOIN, WILLIAM CONDON

and STEVEN BERTOLINO, Petitioners

VERSUS

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES SUPREME COURT

PROOF OF SERVICE

I hereby certify that on this _____ day of _____, 1992, _____ copies of the Petition For Writ of Certiorari, were mailed, postage prepaid, to Stuart Goldberg, United States Attorney, Public Integrity, P.O. Box 27321, Central Station, Washington, D.C. 20038, Counsel for the Respondent, the United States of America.

I further certify that three copies of the Petition for Writ of Certiorari were mailed postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent, the United States of America, in this Court. I further certify that all parties required to be served have been served.

Respectfully submitted:

_____

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Counsel for Petitioners

Walton Aucoin, William

Condon, and Steve Bertolino

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FOR THE FIFTH CIRCUIT

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No 90-3886

UNITED STATES OF AMERICA

Plaintiff-Appellee,

VERSUS

WALTON AUCOIN, WILLIAM CONDON

and STEVEN BERTOLINO

Defendants-Appellants.

Appeal from the United States District Court

for the Eastern District of Louisiana

Before HIGGINBOTHAM, DUHE, Circuit Judges, and HUNTER[1], District Judge

EDWIN F. HUNTER, JR., District Judge:

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[1]District Judge of the Western District of Louisiana, sitting by designation.

Appellants are admitted illegal bookmakers under state law[2] but who challenge their convictions under 18 U.S.C. §1955 (operating an illegal gambling business) and 18 U.S.C. §1962(c) (RICO collection of unlawful debt).[3] At trial, hours of conversations intercepted through court authorized electronic surveillance, supported by expert and fact witness testimony, were presented which demonstrated that during the 1988-89 college and professional football season, appellants were operating a multi-million dollar interstate sports betting handbook in violation of state and federal law. Defendants advance a myriad of arguments on appeal. They chalienged their convictions by arguing that §1962(c) and to a limited extent §1955(c) are unconstitutionally vague on their face as applied to their activities. They also insist that their sentencing under both §1955 and §1962 violate the double jeopardy clause. Additionally, they argue that the district court committed reversible error in failing to suppress betting sheets and certain

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[2]LSA-R.S. 14:90.

[3]There were other defendants in the case. Connick, Fanning, Abraham and Burke were found not guilty on all Counts. Iris Ethridge and Darlene Aucoin Toca accepted plea agreements.

conversations between Aucoin and his attorney which the district court held to be within the crime fraud exception to the attorney-client privilege.

We reject each of appellants' claims on appeal and affirm their convictions.

In September 1988, the Federal Bureau of Investigation ("FBI") and the New Orleans Police Department ("NOPD") initiated an investigation of a large sports bookmaking operation owned and operated by Walton Aucoin. The business was being conducted at the residence of his daughter, Darlene Aucoin Toca, in Jefferson Parish, Louisiana. Aucoin, along with Steven Bertolino, a part-owner of the business, and William Condon, a salaried employee, came to Darlene's house on a daily basis to use a four-phone rotary system that had been set up to take wagers.

In early October, Aucoin, Bertolino and Condon moved their operation to New Orleans. The United States made an application for a court-authorized wiretap on the four phones at the apartment as well as the phone at Aucoin's residence, which also was being used in the gambling operation. Judge Carr approved the government's application. A wiretap was installed.

During the course of the electronic surveillance, thousands of gambling-related conversations were intercepted. These interceptions revealed that Aucoin, Bertolino and Condon were running a large-scale interstate sports bookmaking business, with customers in California, Oklahoma, Ohio and Virginia as well as throughout Louisiana. As bookmakers, they took bets primarily on college and professional football, from at least 80 customers. Fifteen of those customers bet $5000 a game. An FBI gambling expert, who analyzed the intercepted conversations, calculated that in one four-week period the business took in approximately $1.7 million.

The wiretap interceptions revealed the manner in which the business operated. Virtually every day, Aucoin would discuss the betting line and otherwise receive line information from Newport News, Virginia. Aucoin regularly exchanged line information with other bookmakers. These included individuals from Baton Rouge, Plaquemines, New Orleans and Lake Charles, Louisiana. These individuals also acted as sources for Aucoin to lay off bets if he had too many wagers on one side of a game.

On December 2, 1988, NOPD obtained a search warrant from the Criminal District Court in Orleans Parish. The warrant was

executed on December 4, 1988 and Aucoin, Bertolino and Condon were arrested. The two room apartment contained a rotary telephone system, with wire cutters across the lines, a television used to monitor games on which bets were being taken, and written material. This material consisted of books containing handwritten line information, sheets listing football wagers, and bottom sheets.

Bottom sheets record net amounts due and owing from the bookmaking operations' customers. At the time of his arrest, Aucoin asked NOPD officers on the scene for a copy of the bottom and wagering sheets. Aucoin told the officers that if he did not get the sheets, it would put him out of business because he would not know to whom he owed money or who owed money to him. This request was refused.

After being released on bond on the evening of December 4, Aucoin immediately began attempting to obtain copies of the seized bottom and wagering sheets. As he discussed with his daughter Darlene that evening:

> The most important thing is the papers. The papers could break me if they don't give me the papers back . . . Cause I got 80 people could tell me I owe'em anything. . .

He also phoned his friends Wilson Abraham and Paul Burke to ask them to contact New Orleans District Attorney Harry Connick on his behalf and request that he immediately get copies of these bookmaking papers. Aucoin explained to Burke on the night of December 4:

> Now if I don't get the papers back, Paul, that could break me. I mean . . . this could destroy me . . . All I want copies is that I can check bottoms with 80 customers . . .

Aucoin's calls with his attorney Patrick Fanning initially were minimized. However, on December 5, Aucoin related to Bertolino that Fanning told him he would get Aucoin's "papers back not by telling the DA you wanna check bottoms," but by relating the necessity of having the sheets to file his IRS wagering tax return. Aucoin originally thought this was not a good idea, because his tax return was not really due. He ultimately decided, however, that his lawyer's advise was correct and obtained copies of his papers on December 9. He used them to settle up with customers.

Immediately after the December 4 raid, the bookmaking enterprise relocated and moved back to Darlene Aucoin's house. The Jefferson Parish Police Department learned of this operation,

contacted informants and obtained a search warrant. A raid was conducted on December 12. Bookmaking records were seized.

Soon after their release, appellants again re-established the bookmaking operation at Darlene's residence. NOPD learned of this and notified the Louisiana State Police ("LSP"). Search warrants on both Aucoin's residence and his daughter's home were issued. The warrants were executed on January 2, 1989. Aucoin, Bertolino, Condon and Claude Toups, a lookout, were arrested. Very few sheets with bets were found during the search. The majority were hidden in the attic under the insulation. These were retrieved after the police left.

Section 1962(c) was Properly Applied to Appellants

Appellants argue that the district court violated rules of statutory construction in upholding their conviction under the collection of unlawful debt prong of the RICO statute.

> Section 1962(c) of the RICO statute provides:
>
> It shall be unlawful for any person employed or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to

> conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity of collection of unlawful debt.

Liability under this section may be based on "either of 'a pattern of racketeering activity,' or of 'collection of unlawful debt.'" H. J., Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 232, 109 S.Ct. 2893, 2897, 106 L.Ed.2d 195 (1989) (emphasis added).

> Subsection (6) of §1961 expressly defines "unlawful debt" as:
>
> a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, of which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the law relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the

> law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate. (emphasis supplied).

The collection by appellants of illegal gambling debts arising out of the Aucoin bookmaking business, which admittedly was operating in violation of Louisiana law, constitutes a violation of RICO. We decline appellants' invitation to jettison the clear language of the statute.

Contrary to their suggestion, the legislative history provides no support for their argument that additional requirements must be read into the unlawful debt prong of the statute. The House Report on the statute simply explains that the term "unlawful debt" includes debts incurred in connection with an illegal gambling business, and that the prohibition in §1962(c) against the conduct of the enterprise through the prohibited pattern of activity or collection of debt "is without exception." H. Rep. 91-1549, 91st Cong., 2d. Sess. reprinted in 1970 U.S.C.C.A.N. 4007, 4032-33. Lack of any further elaboration by Congress does not provide a basis for

"overrid[ing] the words of the statute." Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495, 105 S.Ct. 3275, 3284 n.13, 87 L.Ed.2d 346 (1985) (refusing to limit RICO statutory language).

Appellants resort to the rule of lenity is unavailing. "[T]he 'touchstone' of the rule of lenity 'is statutory ambiguity.'" Bifulco v. United States, 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980); Lewis v. United States, 445 U.S. 55, 65, 100 S.Ct. 915, 921, 63 L.Ed.2d 198 (1980). The Supreme Court explained in United States v. Turkette, 452 U.S. 576, 587, 101 S.Ct. 2524, 2531 n.10, 69 L.Ed.2d 246 (1981), a case in which it declined to apply the rule of lenity to the RICO statute:

> [T]hat "rule," as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.

See also, Taylor v. United States, 495 U.S. 575, 596, 110 S.Ct. 2143, 2157, 109 L.Ed.2d 607 (1990) (rule of lenity "cannot dictate an implausible interpretation").[4]

In their briefs and oral argument, appellants insist that "the RICO statute must be read to require that any gambling-based RICO [collection of unlawful debt] prosecution using a state or local law crime as its predicate be one that carries a one-year jail term." They make this assertion even though they concede that the statute "literally" imposes no such requirement.

Appellants argue, by isolated references to the legislative history of RICO, that §1962(c) should be limited to large-scale,

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[4]Appellants reliance on Yellow Bus Lines, Inc. v. Local Union 639, 913 F.2d 948 (D.C. Cir. 1990) (en banc) is misplaced. There, the D. C. Circuit focused on the participation element of §1962(c). The court referred in passing to the rule of lenity in holding that RICO could not be stretched so far as to allow Yellow Bus to civilly sue a union seeking recognition, by alleging in its complaint that Yellow Bus was the enterprise and the Union was participating in the conduct of its affairs. The court noted such a reading would "fly in the face of the statute's language and purpose." Id. at 955.

illegal gambling businesses that are part of organized crime. The Supreme Court has rejected just such attempts to extract from RICO's legislative history. The Court has noted, "RICO's language supplies no grounds to believe that Congress meant to impose such a limit on the Act's scope," and has pointed out that in those titles of the Organized Crime Control Act "where Congress did intend to limit the new law's application to the context of organized crime, it said so." H. J., Inc., 109 S.Ct. at 2903.

Appellants in this case operated an illegal gambling business that handled millions of dollars each year. It involved over 80 bettors in numerous states. More than 15 individuals were associated with the operation business. They were admittedly professional illegal bookmakers. It is clear to us that Congress intentionally created a statutory scheme where proof of the collection of unlawful debt is a "substitute for a showing that appellants engaged in two or more predicate acts forming a pattern of racketeering activity." United States v. Eufrasio, 935 F.2d 553, 563 n.12 (3rd Cir. 1991). Both, RICO and §1955 were enacted at the same time as part of a single legislative scheme, the Organized Crime Control act of 1970. See Pub. L.91-452, §803 (codified as 18 U.S.C. §1955), §901 (codified as 18 U.S.C. §§ 1961 et seq).

Section 1955 is expressly referenced in the RICO statute. Clearly Congress intended that the collection of unlawful debt prong and the pattern of racketeering prong should complement and not supersede one another. In RICO cases, defendants have been charged and convicted of violating both offenses.[5] See, e.g., United States v. Angiulo, 847 F.2d 956, 960 (1st Cir. 1988); United States v.

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[5]Counsel for the United States in oral argument summarized his position - utilizing this language:

> In essence, we just contend that what Congress wanted to do was to single out for special treatment the collection of unlawful debt through an organized enterprise. Congress believed that that had certain potential pernicious effects and that is why it set forth specific language in there in addition to the pattern racketeering language to deal with that.

This Court agrees with this characterization and analysis of Congressional intent. There is no ambiguity introduced by the fact that two parts of a single statute (the pattern of racketeering prong and the collection of unlawful debt prong) punish separate violations. United States v. Galvan, 949 F.2d 777 (5th Cir. 1991).

Giovanelli, 945 F.2d 479, 486 (2d Cir. 1991); Eufrasio, 935 F.2d at 557-58.

For similar reasons, appellants' argument that "because [they] were charged with violations of 18 U.S.C. 1955 in Count 2, they should have been prosecuted under the pattern of racketeering prong because it is more specific and because the penalty it imposes for gambling offenses is less severe," must be rejected. The fact that one statute prescribes a felony and the other prescribes a misdemeanor does not affect the prosecutor's authority to choose among statutes. United States v. Smith, 915 F.2d 959, 962 n.4 (5th Cir. 1990); United States v. Oldfield, 859 F.2d 392, 398 (6th Cir. 1988) (quoting United States v. Schaffner, 715 F.2d 1099, 1102 (6th Cir. 1983)); United States v. Cavada, 821 F.2d 1046 (5th Cir. 1987).

Sections 1962(c) and 1955 are not Constitutionally Defective

Appellants press their contention that the RICO statute and §1955 are both void for vagueness on their face and as applied. This is true, they say, because "identical gambling offenses are treated entirely different depending on whether the Government elects to prosecute an individual under the pattern of racketeering

prong of RICO or the unlawful debt collection prong of RICO." We reiterate again that, "when conduct violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."[6] Moreover, a single statute may penalize more than one offense. United States v. Galvan, 949 F.2d 777 (5th Cir. 1991) (upholding consecutive sentences for defendant under §1512(a)(1)(A) and (C)).

Appellants would re-write RICO contending that "a violation of the unlawful debt collection prong of RICO should normally be punished less severely than the 18 U.S.C. §1955 violation." They claim the two prongs cannot be logically reconciled, because one provides a violation for a pattern of racketeering activity involving two §1955 violations and the other provides for a violation under the unlawful collection of debt. They insist that the "Government is attempting to punish one aspect of the gambling business (the collection of unlawful gambling debts) more severely than the entire gambling business." The short answer is

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[6]Cavada, 821 F.2d at 1048 (quoting United States v. Batchelder, 442 U.S. 114, 123-24, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755 (1979)).

that Congress decided that the collection aspect warrants a greater penalty. The fact that another statute is available is irrelevant.[7]

Next, appellants contend that RICO is unconstitutionally void for vagueness because "the collection of illegal gambling debts may not be an element of a local, state or federal gambling offense." Section 1961(6) clearly defines an unlawful debt as, inter alia, a debt "incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof . . . [and] which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof." Appellants knew they were operating a bookmaking business in violation of Louisiana law and admitted as much at trial. Their assertion that "[t]here is no provision of Louisiana or federal law that criminalizes the collection of gambling debts" is incorrect. Section 1955 prohibits the conducting of an illegal gambling enterprise and La. Rev. Stat.

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[7]Appellants reference to the Sentencing Guidelines misses the point. Congress chose to punish those persons participating in an enterprise through the collection of an unlawful debt stringently. The punishment is definite and certain. There is no vagueness.

14:90 penalizes the conducting of a gambling business. The collection of money owed on wagers is an essential part of the gambling business.

Finally, appellants contend that §1962(c) is unconstitutionally vague because it purportedly eliminates the need for criminal intent. The Indictment charged that they did "knowingly and willfully conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through the collection of unlawful debt . . ." The jury was instructed that the crimes "charged require proof of specific intent before a defendant can be convicted," that "the Government must prove beyond a reasonable doubt that the defendant knowingly and willfully conducted or participated in the conduct of the affairs of the enterprise through the collection of an unlawful debt," and that the "Government must show that a defendant knowingly and willfully omitted or caused . . . at least one collection of the unlawful debt."

Appellants assert that "there was no criminal intent in the present case" and that they did not believe they were violating the law in collecting their bookmaking winnings. The jury found that this was not true.

> "[W]here defendants know that their conduct is violative of state law, their wrongful purpose ab initio, established beyond a reasonable doubt, leaves them in no position to claim that they had no intention of violating a federal statute which, in fact, denounced the unlawful conduct as also constituting a federal crime. Defendants may have misunderstood the full reach of the federal statute but they deliberately took that risk when they set out upon a calculated violation of the laws of [the state]." United States v. Thaggard, 477 F.2d 626, 632 (5th Cir. 1973).

The Conversations Between Aucoin and Counsel

The district court conducted an in camera review of the conversations between Aucoin and his counsel. It rejected the invocation of the attorney-client privilege. The ruling was pegged on the crime-fraud exception because there was prima facie evidence that Aucoin had sought and obtained this advice in furtherance of criminal activities. The application of the attorney-client privilege is

a question of fact to be determined in light of the purpose of the privilege and guided by judicial precedent. The clearly erroneous standard of review applies to the district court's factual findings. Fed.R.Civ.P. 52(a), Bryam v. United States, 705 F.2d 1418 (5th Cir. 1983). We review the application of the controlling law de novo.

There were 25 intercepted conversations between Aucoin and counsel. The evidence presented to the district court constituted prima facie evidence that the crime-fraud exception applied. Aucoin admitted that he operated in violation of Louisiana law. The jury subsequently found beyond a reasonable doubt that he violated RICO. The evidence demonstrated that Aucoin sought the return of his gambling records for the purpose of continuing to operate his illegal gambling business. His counsel, with knowledge of Aucoin's participation in illegal activity and desire to continue these activities, orchestrated a plan to obtain for the Aucoin gambling enterprise documents critically necessary to its continued operation and then assisted in the execution of this plan. Then, too, the excerpted conversations reveal that counsel, even after the return of Aucoin's records, assisted the enterprise in its efforts to insulate itself from further raids by local enforcement. Combining the

contested conversations with intercepted conversations between Aucoin and others, concerning what advice he had been given by his lawyer, it was certainly proper and appropriate to apply the crime-fraud exceptions.

The district court's ruling, even if erroneous, would not suffice for reversal of Aucoin's conviction unless it affected a substantial right of his. United States v. Scott, 678 F.2d 606, 612 (5th Cir. 1982); United States v. Moody, 923 F.2d 341, 352 (5th Cir. 1991), cert denied, 112 S.Ct. 80 (1991). In the context of suppression of evidence, the test for harmless error is "whether the trier of fact would have found the defendant guilty beyond a reasonable doubt [if the evidence had been suppressed]." Moody, 923 F.2d at 352.

This case is not "the 'MAW' and 'PAW' operation down the street that operates out of the corner grocery store" as analyzed by defense counsel during oral argument. There was overwhelming evidence of guilt. The primary evidence supporting the convictions was the intercepted conversations between Aucoin and his bettors and other bookmakers. Two of Aucoin's bettors testified that they placed bets with him and he collected the bets personally, or through others. The contested conversations were logically harmless, given

the theory of defense. Defendants admitted conducting a million dollar illegal gambling operation. They merely contested whether that operation consisted of five or more people. The contested conversations primarily concern attempts to recover seized gambling records. They were therefore logically harmless to the jury's decision whether the Aucoin operation included five or more people. There was overwhelming evidence apart from the conversations with Fanning that Aucoin's operation involved at least 15 people.

Convictions on Both Counts of the Indictment Did Not Violate Double Jeopardy[8]

Appellants argue that their conviction and sentencing under both RICO and §1955 violate the Double Jeopardy Clause of the constitution by punishing them twice for the same conduct. The Double Jeopardy Clause of the Fifth Amendment states that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. It is well settled that this clause protects against a double prosecution for the same

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[8]Aucoin was sentenced to 15 months in prison as to Counts 1 and 2 to run concurrently. Condon and Bertolino were each sentenced to 6 months in prison to run concurrently.

offense. But it is equally well established that a defendant may be charged, convicted, and sentenced in the same case for violating a statute and a RICO predicated on the statute. E.g. United States v. Erwin, 793 F.2d 656, 669 (5th Cir. 1986); United States v. Phillips, 664 F.2d 971, 1009 n.55 (5th Cir. 1981); see also United States v. Pungitore, 910 F.2d 1084 (3rd Cir. 1990) (affirming convictions of two defendants for violating §1955, collection of unlawful debt RICO, and pattern of racketeering RICO). Thus, in the present case, the defendants' reliance on the Double Jeopardy Clause is misplaced.

The elements of the statutes differ. The gambling statute requires proof that five or more persons were participating in the business, that the business was in substantially continuous operation for 30 days or more, or that the business had gross revenue of $2000 in any single day. 18 U.S.C. §1955(b)(1). None of these elements are required to prove a RICO violation. Similarly, RICO requires proof that an enterprise existed, and that the person participated in the conduct of the enterprise through the collection of unlawful debt. 18 U.S.C. §1962(c). Although collection of debts is a necessary part of a gambling operation, debt collection is not a specified element of §1955.

The Gambling Records Seized From Aucoin

The United States introduced bottom sheets, books containing handwritten line information, and sheets with football wagers. These had been seized from Aucoin during searches conducted in December of 1988 and January of 1989. The evidence, including statements by Aucoin on recorded conversations, revealed that Aucoin used these materials to operate his illegal gambling business. Asserting his Fifth Amendment right against self-incrimination and citing 26 U.S.C. §4424, Aucoin sought the suppression of all the seized materials.

He voluntarily maintained the records for the purpose of the illegal gambling enterprise. He contended that the materials seized in the three raids in 1988 and 1989 were maintained by him for the purpose of complying with tax laws and that consequently their use in this prosecution was barred under the Fifth Amendment and §4424. The district court found that the records, "while they may have assisted [Aucoin] in preparing his tax return, were obviously maintained in addition as the basic business records of his alleged gambling enterprise." This was certainly correct. The records were not the type required to be kept for tax purposes. On their face, many of the documents seized from the gambling sites, such as the

books containing line information obtained from other bookmakers, were unrelated to calculating wagers. The documents were used to set the betting odds and to keep track of wagers made by individual bettors, total amounts wagered on each side of each game, and the amounts to be collected or paid. The experienced vice investigators who examined the seized records agreed that they were the type of records maintained by bookmakers, and were essential to carrying on this illegal gambling business.

Once again, error, if any, from the introduction of the gambling records was harmless. See Arizona v. Fulminante, _____1 U.S. _____, 113 L.Ed.2d 302 (1991). The intercepted conversations and the testimony at trial conclusively demonstrated the operation of a large-scale gambling operation using numerous other persons to set his line, take bets, pay and collect from bettors, obtain line information and lay off excess bets. There is no factual dispute in this case. Appellants concede that the gambling business satisfied all the elements of §1955, except for the requirement that five or more people take part in conducting the business. We reiterate, Aucoin's assertion that he, Bertolino, and Condon were the only persons involved in operating the illegal gambling business, is just not true. The testimony and tape

evidence conclusively showed that Darlene Aucoin, Iris Ethridge and many others provided services that were necessary or helpful to the gambling business, and that numerous persons regularly exchanged line information or took lay off bets from Aucoin. see e.g., United States v. Jones, 712 F.2d 115, 120 (5th Cir. 1983); United States v. Colacurcio, 659 F.2d 684, 688 (5th Cir. 1981), cert. denied, 455 U.S. 1002, 102 S.Ct. 1635, 71 L.Ed.2d 869 (1982); United States v. Tucker, 638 F.2d 1292, 1295 (5th Cir. 1981), cert. denied, 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 111 (1981).

We have reviewed each of defendants-appellants' arguments and find them to be without merit. We affirm the judgments of sentence and conviction with respect to each.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No 90-3886

UNITED STATES OF AMERICA, Plaintiff-Appellee,

VERSUS

WALTON AUCOIN, WILLIAM CONDON

and STEVEN BERTOLINO, Defendants-Appellants.

as to AUCOIN AND BERTOLINA ONLY.

Appeal from the United States District Court

for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(July 30, 1992)

Before HIGGINBOTHAM, DUHÉ, Circuit Judges, and HUNTER*, District Judge.

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* District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA CRIMINAL ACTION

versus NO. 89-541

WALTON AUCOIN, ET AL SECTION: E/6

RULING ON MOTIONS TO SUPPRESS

Defendants Walton Aucoin ("Aucoin"), Harry Connick ("Connick"), Patrick Fanning ("Fanning"), Darlene Aucoin Toca ("Toca"), William G. Condon ("Condon"), and Steven Bertolino ("Bertolino") have filed motions to suppress various evidence seized pursuant to search warrants, pen registers, and electronic surveillance orders which were authorized in the investigation which led to the indictment herein. The Court previously has ruled on Connick's motion to suppress all evidence seized on December 4, 1988 pursuant to the search warrant issued by the state court judge on December 2, 1988 denying suppression. (Rec. Doc. No. 204). The Court there found that the defendant had not made the substantial preliminary showing required by Franks v. Delaware, 438 U.S. 154, 90 S.Ct. 2674 (1978), that the identity of the confidential informant was privileged and therefore could not be

disclosed, and that the search warrant and the resulting search was valid.

I.

Motion of Walton Aucoin to Suppress

Seized Gambling Records, Pen Registers,

Attorney-Client Conversations, and

Electronic Surveillance Orders

Aucoin seeks the suppression of (1) all gambling records seized during searches conducted on December 4, 1988, December 12, 1988, January 1, 1989, and December 22, 1987, (2) the pen register records related to the gambling enterprise's telephones, (3) the intercepted conversations between himself and Fanning based upon attorney-client conversations, and (4) the electronic surveillance orders based upon the alleged failure to minimize. The Government opposes the motions on all grounds asserted.

The basis upon which Aucoin moves to suppress the evidence seized pursuant to the search warrants is the Internal Revenue Service statutes which prohibit the use against him at trial of wagering tax filings and registrations which he filed with the IRS pursuant to 26 U.S.C. sec. 4401 et seq. Aucoin alleges that the gambling records seized pursuant to the search warrants in 1988 and

1987 were maintained by him for the purpose of complying with IRS regulations and that therefore their use against him at trial is barred under 28 U.S.C. sec. 4424 and by his privilege against self-incrimination under the Fifth Amendment.

In order to conclude that the wagering records seized fit into the category of wagering tax filings and registrations whose use against Aucoin is prohibited at trial, Aucoin must demonstrate that the records seized were maintained solely for purposes of paying his federal gambling taxes and not for the purpose of maintaining his gambling enterprise. The records kept by Aucoin and seized by the Government pursuant to the search warrants, while they may have assisted him in preparing his tax return, were obviously maintained in addition as the basic business records of his alleged gambling enterprise. The Government came into the possession of these documents through legitimately issued search warrants. Under these circumstances, 26 U.S.C. sec. 4424 does not mandate their suppression or bar their use at trial. United States v. King, 834 F.2d 109, 114 (6th Cir. 1987); United States v. Brian, 507 F. Supp. 761-768-769 (D.R.I. 1981).

Aucoin argues that the pen registers referred to in the November 7, 1988 wiretap application were illegally installed, but

these pen registers were installed upon the authority of the order of United States Magistrate Alma L. Chasez on September 2, 1988. There is no showing that the pen registers were illegally installed in any manner.

The defendant also argues that the Government failed to "minimize" the electronic surveillance by not terminating the surveillance after the December 4, 1988 search warrant and by limiting the interception of irrelevant conversations. The Court has reviewed in their entirety the wire tap applications and accompanying affidavits submitted as well as the December 2, 1988 search warrant and the return on the warrant. It is apparent that the Government applied for the wiretaps in order to discover and identify, as stated in the applications, the "full scope of the illegal activity . . ., including the identities of all participants, their places, and methods of operation, and the various activities in which they are engaged in furtherance of their criminal purposes." The authorizing judge, the Honorable Patrick E. Carr, authorized the installation of the wiretaps on November 7, 1988, November 28, 1988, and extended the wiretaps on December 8, 1988 and December 28, 1988. Judge Carr reviewed the requests for the December extensions and granted them. This Court finds no reason

whatsoever to find that these extensions were unnecessary or overreaching, as the investigation continued after the search warrants were executed on December 4, 1988. In fact, it is arguable that the full scope of the enterprise was not revealed until after the December 4, 1988 seizure occurred and the various individuals endeavored to retrieve business records of the enterprise for whatever purpose they were sought. Aucoin's argument in this vein is without merit.

Aucoin seeks suppression of all intercepted conversations by alleging that the Government agents, as a whole, failed to minimize the electronic interceptions. The defendant's basic objection is that the agents intercepted telephone calls between himself and his attorney, Patrick Fanning, which constituted a violation of the attorney-client privilege as well as a failure to minimize. In its discussion of defendant Fanning's motion to suppress, the Court discusses the issue of attorney-client privilege as applied herein. A review of the calls intercepted through the wiretaps authorized by Judge Carr convinces the Court that the Government agents did minimize the interceptions to a reasonable extent in light of the facts and circumstances known to them. While it is impossible to avoid interception of all irrelevant conversations,

18 U.S.C. sec. 2518 requires only that the agents conduct the surveillance in such a way as to minimize the interception of "nonrelevant conversations." Scott v. United States, 436 U.S. 128, 139-140. Aucoin has failed to establish the "pattern of interception of innocent conversations which developed over the period of the wiretap" which is required for suppression. United States v. Lawson, 780 F.2d 535, 540 (6th Cir. 1985). This argument is without merit.

II.

Motion of Harry Connick

to Suppress

The Court previously has denied Connick's motion to suppress the evidence seized on December 4, 1988 pursuant to the December 2, 1988 search warrant on the basis that the defendants did not make the substantial preliminary showing required for a Franks hearing (Rec. Doc. No. 204). The defendant further alleges that the execution of the search warrant was illegal because the police officers allegedly "kidnapped" Bertolino and forced him to open the apartment door of the premises. A hearing was held on this issue at which only Bertolino testified. Bertolino admitted that Aucoin and Condon were present in the apartment when he arrived

with the police officers. He further admitted that the apartment was not searched until the officer who had the search warrant, which had been signed two days previously, arrived. He could not state whether or not the search warrant was shown to Aucoin or not since they were in two different rooms. Under these circumstances, the Court does not find that the search warrant was improperly or illegally executed. Suppression is not warranted on this basis.

III.

Motion of Patrick Fanning to

Suppress Wiretaps for Failure to

Minimize Privilege Communication

Defendant Fanning seeks suppression of the intercepted conversations between himself and Aucoin on the basis that the conversations were protected by attorney-client privilege and should have been minimized. Defendant Aucoin joins in this motion and further moved on his behalf for suppression on this ground. Alternatively, Fanning requests that this Court conduct an in camera review of the conversations to determine whether the crime-fraud exception to the attorney-client privilege protection under the procedure discussed in United States v. Zolin, _____ U.S. _____, 109 S.Ct. 2619, 2626 n.17 (1989) applies. As defined

by the court in United States v. Harrelson, 754 F.2d 1153, 1167 (5th Cir. 1985), "it is well established that the privilege does not apply where legal representation was secured in furtherance of intended, or present, continuing illegality." Stated another way, "[t]he crime fraud exception comes into play if the client consults an attorney in carrying out a contemplated illegal or fraudulent scheme." In re International Systems & Controls Corporation Securities Litigation, 693 F.2d 1235, 1242 (5th Cir. 1982).

If the Government can make a "prima facie showing that the attorney was retained to promote intended or continuing criminal activity, the privilege may not be asserted", United States v. Harrelson, 754 F.2d 1153, 1167 (5th Cir. 1985), whether or not the "lawyer is a knowing accomplice or the unwitting tool." United States v. Ballard, 779 F.2d 287, 292 (5th Cir. 1986). The district court may conduct an in camera review of the materials in question to reach a determination whether the privilege applies at the request of the party opposing the privilege once there is an adequate factual showing indicating that the crime-fraud exception may be applicable. Zolin, 109 S.Ct. at 2361-2363. Once the Court finds that a prima facie showing has been made indicating that the crime-fraud exception does apply, the client is not afforded an opportunity to

rebut the showing. Id. at 2626 n.17. The client may introduce evidence at trial, however, to contradict and overcome the prima facie showing. In Re Grand Jury Proceedings in Matter of Fine, 693 F.2d 199, 203 (5th Cir. 1981).

The Court has conducted an in camera review of the intercepted electronic communications between Fanning and Aucoin. The Court finds that a prima facie showing has been established by the Government for the application of the crime-fraud exception to the attorney-client privilege. Therefore, Fanning's and Aucoin's motions to suppress the introduction of these conversations on this basis should be denied.

IV.

Motion of Darlene Aucoin Toca

to Suppress

Defendant Toca has filed an extensive motion to suppress the taped conversations which were intercepted by the wire taps. Lengthy argument was heard by the Court on this motion. The gist of Toca's motion is that the wire tap authorizations were not supported by probable cause because of certain "irregularities" Toca claims existed in the applications and affidavits. Toca first argues that she is entitled to examine the law enforcement officers with

> incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof . . . . and which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof . . . .18 USC 1962(c) and 18 USC 1961(6) (emphasis added).

Under a literal reading of the RICO statute, a single element of the RICO statute is satisfied by the collection of debt arising from illegal gambling activity and in connection with an illegal gambling business. Id.

Under a literal reading of RICO, it is clear that RICO does not criminalize the collection of "unlawful" debt, rather, RICO defines the phrase "unlawful debt" collection as the collection of debts that arise from a gambling business that violates local, state or federal law. Consequently, it is not the debt or the collection that is unlawful. It is the activity from which the debt arose that is unlawful. (18 USC 1961(6)).

businesses to verify that the caller is calling from within the state of Nevada before releasing line information, there is a distinct possibility that a person calling from a New Orleans pay phone could call a private citizen in Nevada who has already legally obtained the line information from the business and repeat the information to the Louisiana resident in violation of Nevada law. A review of the applications and orders as a whole convinces the Court that the orders were supported by probable cause. The motion of Toca to suppress is without merit.

V.

Motion of William G. Condon and

Steven Bertolino to Suppress Evidence

Produced by Wiretap Orders

Defendants Condon and Bertolino seek suppression of the evidence produced by the wiretap orders because (1) the communications were unlawfully intercepted inasmuch as the application failed to demonstrate that the wiretaps were required pursuant to 18 U.S.C. sec. 2518(c) and (2) the wiretap orders infringed on their rights under the Fourth and Fifth Amendments to the United States Constitution. These arguments have been discussed previously herein and in the ruling on Connick's motion

to suppress; the Court has found the allegations to be without merit. This motion should be denied.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motions of defendants Walton Aucoin, Harry Connick, Patrick Fanning, Darlene Aucoin Toca, William G. Condon, and Steven Bertolino to suppress be and are hereby DENIED.

New Orleans, Louisiana, this 1st day of June, 1990.

(S) Marcel Livaudais, Jr.

MARCEL LIVAUDAIS, JR.

United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

INDICTMENT FOR CONDUCTING
THE AFFAIRS OF AN ENTERPRISE THROUGH
THE COLLECTION OF UNLAWFUL DEBT,
CONDUCTING AN ILLEGAL GAMBLING BUSINESS,
AND FALSE DECLARATION BEFORE A GRAND JURY

UNITED STATES OF	*	CRIMINAL DOCKET
AMERICA	*	NO. 89-541
versus	*	SECTION: E MAG. 6
	*	VIOLATION:
WALTON K. AUCOIN	*	18 USC 1962(c)
HARRY F. CONNICK	*	18 USC 1955
PATRICK FANNING	*	18 USC 1623
WILSON P. ABRAHAM	*	18 USC 2
PAUL BURKE	*	

STEVEN BERTOLINO *

WILLIAM G. CONDON *

IRIS ETHRIDGE *

DARLENE AUCOIN TOCA *

* * *

The Grand Jury charges that:

INTRODUCTION

1. In a sports betting operation, sometimes known as a sports handbook, a bookmaker regularly makes and keeps records of wagering activity in order to conduct his business. Among the records kept is a list of amounts owed, often referred to by a bookmaker as his bottom sheet, and a listing of current bets. These records are referred to hereinafter as "bookmaking records."

2. At all times relevant to this indictment, defendant WALTON K. AUCOIN was a professional bookmaker operating a large interstate sports handbook in violation of state and federal gambling laws, and utilizing defendants STEVEN BERTOLINO, WILLIAM G. CONDON, IRIS ETHRIDGE, DARLENE AUCOIN TOCA, and other persons known and unknown to the Grand Jury, in the bookmaking operation.

3. At all times relevant to this indictment, defendant HARRY F. CONNICK was the District Attorney for Orleans Parish, Louisiana.

4. At all times relevant to this indictment, defendant PATRICK FANNING was an attorney-at-law, licensed to practice in the State of Louisiana. He had previously worked for defendant CONNICK as an Assistant District Attorney in Orleans Parish and also worked as an Assistant United States Attorney for the Eastern District of Louisiana.

5. At all times relevant to this indictment, defendant WILSON P. ABRAHAM was a bettor with the AUCOIN bookmaking operation, and had loaned about $15,000 to defendant HARRY F. CONNICK'S unsuccessful campaign for Attorney General of Louisiana.

6. At all times relevant to this indictment, defendant PAUL BURKE was a friend and social acquaintance of defendants WALTON K. AUCOIN and HARRY F. CONNICK.

7. On Sunday, December 4, 1988, defendants AUCOIN, BERTOLINO, and CONDON were arrested by officers of the New Orleans Police Department for operating an illegal gambling business. Bookmaking records were seized, along with

AUCOIN's 1987 Jaguar, which he had used in conducting his operation. Without these records, it was virtually impossible for the AUCOIN bookmaking operation to be certain how much to pay and collect from its bettors and other bookmakers.

COUNT ONE

1. The INTRODUCTION to this indictment is incorporated herein as though fully set forth.

2. At all times relevant to this indictment, WALTON K. AUCOIN, STEVEN BERTOLINO, WILLIAM G. CONDON, IRIS ETHRIDGE, DARLENE AUCOIN TOCA, and other persons known and unknown to the Grand Jury, constituted an "enterprise" as that term is defined in Section 1961(4) of Title 18, United States Code, that is, a group of individuals associated in fact to conduct the aforesaid illegal gambling business, which enterprise engaged in and whose activities affected interstate commerce.

3. From on or about September 1, 1988, through on or about January 31, 1989, in the Eastern District of Louisiana and elsewhere,

WALTON K. AUCOIN

STEVEN BERTOLINO

WILLIAM G. CONDON

IRIS ETHRIDGE

DARLENE AUCOIN TOCA

defendants herein, being employed by and associated with this gambling enterprise, did knowingly and willfully conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through the collection of unlawful debt, as that term is defined in Section 1961(6) of Title 18, United States Code, that is, debt incurred or contracted in gambling activity which was in violation of the law of the United States and a State or political subdivision thereof, and which was incurred in connection with the business of gambling in violation of the law of the United States and a State or political subdivision thereof; further,

HARRY F. CONNICK

PATRICK FANNING

WILSON P. ABRAHAM

PAUL BURKE

defendants herein, also being associated with the enterprise, did knowingly and willfully conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through knowingly and willfully aiding, abetting, counselling, inducing and

procuring the collection of unlawful debt, as that term is defined in Section 1961(6) of Title 18, United States Code.

PARTICIPATION OF THE DEFENDANTS

4. Among the means by which the defendants participated in the conduct of the affairs of the enterprise were the following:

5. After the search and arrest of defendants AUCOIN, BERTOLINO, and CONDON on December 4, 1988, defendants AUCOIN and FANNING devised a scheme to quickly obtain copies of the seized bookmaking records, so that AUCOIN and his associates could pay and collect outstanding bookmaking debts and continue their illegal gambling business. Defendants AUCOIN and FANNING also schemed to obtain the return of defendant AUCOIN'S 1987 Jaguar.

6. Defendant AUCOIN contacted defendants ABRAHAM and BURKE, and asked them to intercede with defendant CONNICK to quickly get copies of defendant AUCOIN'S bookmaking records, so that AUCOIN could pay and collect his bookmaking debts and continue the illegal gambling business without disruption.

7. Defendants FANNING, ABRAHAM and BURKE provided defendant CONNICK with a phony "legitimate" reason for AUCOIN's need to quickly obtain copies of the bookmaking records: to use those records to compile and file his December federal gambling stamp tax returns. Defendant CONNICK was aware that this "legitimate" reason was false.

8. Despite being advised by the New Orleans police and his own staff that defendant AUCOIN needed the bookmaking records solely to pay and collect the illegal bookmaking debts and to continue the illegal gambling business without disruption, defendant CONNICK, without examining the records and before the case had been referred to or accepted by his office for prosecution, ordered the return of copies of the bookmaking records to defendant AUCOIN, who he had been informed was one of the largest bookmakers in Louisiana. Defendant CONNICK, despite also being advised by the New Orleans police that the 1987 Jaguar was used by defendant AUCOIN in paying and collecting illegal gambling debts and was therefore subject to forfeiture, told defendant FANNING that he would attempt to help AUCOIN get his car returned.

9. Shortly after receiving copies of the bookmaking records ordered returned to him by defendant CONNICK, defendant AUCOIN and his associates paid and collected illegal gambling debts recorded in those records.

All in violation of Sections 1962(c) and 2 of Title 18, United States Code.

COUNT TWO

1. The INTRODUCTION to this indictment is incorporated herein as though fully set forth.

2. From on or about September 1, 1988, through on or about January 31, 1989, in the Eastern District of Louisiana and elsewhere,

WALTON K. AUCOIN

STEVEN BERTOLINO

WILLIAM G. CONDON

IRIS ETHRIDGE

DARLENE AUCOIN TOCA

defendants herein, and other persons known and unknown to the Grand Jury, unlawfully, knowingly and willfully did conduct, finance, manage, supervise, direct and own all or part of an illegal gambling business, that is, a sports bookmaking operation in

violation of the laws of the State of Louisiana, including La. Rev. Stat. 14:90, which business involved five or more persons who conducted, financed, managed, supervised, directed, and owned all or part of it, and which business was and remained in substantially continuous operation for a period in excess of thirty days and which had gross revenue of $2,000 or more in any single day; further,

HARRY F. CONNICK

PATRICK FANNING

WILSON P. ABRAHAM

PAUL BURKE

defendants herein, did knowingly and willfully aid, abet, counsel, induce and procure the commission of said offense.

All in violation of Sections 1955 and 2 of Title 18, United States Code.

COUNT THREE

1. On or about the 15th day of September, 1989, in the Eastern District of Louisiana, PAUL BURKE, defendant herein, having taken an oath to testify truthfully before a duly empaneled federal grand jury, did knowingly make false material declarations in a matter then pending before said grant jury.

2. At that time and place, the grand jury was conducting an investigation into possible violations of federal criminal laws in the Eastern District of Louisiana, including Sections 1962(c) and 1955 of Title 18, United States Code, relating to an illegal gambling business conducted by Walton K. Aucoin and others.

3. It was material to this investigation to determine the manner and means by which the debts of the illegal bookmaking business were paid and collected, and the manner and means by which Walton K. Aucoin and others arranged to have copies of bookmaking records returned to him after they were seized by the New Orleans police on December 4, 1988.

4. At that time and place described in paragraph 1, above, PAUL BURKE, being duly sworn, did knowingly make false material declarations in the following underscored portions of his testimony:

> Q. Now, directing your attention, sir, to sometime in early December 1988, did you get a call from Mr. Aucoin?
>
> A. Yes. In early December, I think it was on a Sunday, the 4th of December, he called me and he told me that he had been arrested for bookmaking, gambling in New Orleans.

• • •

Q. In the first call what did he tell you about why he needed to get his records back quickly?

A. Because he said he had to pay a federal tax on his gambling every month and this, I think, was the Sunday that he called me when he was arrested, and if memory serves me correctly, he had to have that by Tuesday to pay these federal taxes.

Q. And did he tell you other reason at that time?

A. No, sir. To my knowledge, he told me absolutely no other reason.

• • •

Q. Did he [Walton Aucoin] ever tell you or did anybody else ever tell you or give you reason to believe that the tax return reason, you know, initial reason he told you was not a legitimate reason, not a true reason, not a real reason?

A. No, sir. No one ever said that to me.

That was never discussed.

Q. Or said anything that would lead you to believe that?

A. No, sir.

• • •

Q. Concerning the tax matters, did Mr. Aucoin tell you when his taxes were due?

A. As I recall, he said they were due soon. As I recall, it was on the Tuesday. This was on Sunday, the 4th, he was talking to me, and I think he was talking about Tuesday the 6th.

Q. He told you they would be due Tuesday the 6th?

A. Yes.

Q. You didn't come up with the date of Tuesday the 6th as the due date, did you?

A. Positively. I have no way of knowing when his taxes were due.

Q. And you wouldn't have instructed Mr. Aucoin that you had come up with a date and given it to Mr. Connick, would you?

A. No, Sir. I didn't instruct any of that. I was following. I wasn't leading. I was minding my own business.

All in violation of Section 1623 of Title 18, United States Code.

COUNT FOUR

1. On or about the 3rd day of November, 1989, in the Eastern District of Louisiana, IRIS ETHRIDGE, defendant herein, having taken an oath to testify truthfully before a duly empaneled federal grand jury, did knowingly make false material declarations in a matter then pending before said grand jury.

2. At that time and place, the grand jury was conducting an investigation into possible violations of federal criminal laws in the Eastern District of Louisiana, including Sections 1962(c) and 1955 of Title 18, United States Code, relating to an illegal gambling business conducted by Walton K. Aucoin and others.

3. It was material to this investigation to determine the manner and means by which the debts of the illegal gambling business were paid and collected, and the manner and means by which Walton K. Aucoin and other arranged to have copies of his bookmaking records returned to him after they were seized by the New Orleans police on December 4, 1988.

4. At that time and place described in paragraph 1, above, IRIS ETHRIDGE, being duly sworn, did knowingly make false material declarations in the following underscored portions of her testimony:

Q. Can you tell the Grand Jury where you are employed?

A. I was employed at Merchants Bank. Presently I'm not, but I did work for Merchants Bank in Kenner. I worked there for 11 years.

• • •

Q. Now, while you were at the bank, did you handle any business for Mr. Aucoin?

A. Yes. All of it.

• • •

Q. He would only deal with you, right?

A. Yes.

• • •

Q. Sometimes he would say, "I owe so and so 4,000 bucks," right?

A. Maybe so. A couple of times.

Q. And you would hold that envelope there?

A. Yes.

Q. And someone would come up to your teller station and say, "I'm John Doe"?

A. Uh-huh (Indicating an affirmative response).

Q. Then what would you do?

A. Well, I would just give them the envelope.

• • •

Q. Miss Ethridge, have you ever done this for any other customers besides Mr. Aucoin?

A. No.

Q. This happened almost every day, right?

A. No. It only happened at the most four -- four times.

Q. Four times total that you -- that you did this?

A. Right.

• • •

Q. Did you ever tell Mr. Aucoin that you would put money into an envelope where you would pay someone a certain amount of money and he had to pay the money later because you had to cover it?

A. No. Most of the time I -- like I said, I had some - some -- some money to give to somebody.

• • •

Q. Did you ever take money out of the bank's general funds, the till, the vault, any teller money, and essentially lend it to Mr. Aucoin until he could cover it later in the day?

A. No.

• • •

Q. And you continued to -- after this first arrest, you continued to handle transactions for Mr. Aucoin, right?

A. Yes. Banking transactions, yes.

Q. And people continued to come in, and you handed them envelopes at Mr. Aucoin's instructions; is that right?

A. Not after the arrest, no.

Q. Not after the first arrest?

A. He was not --

Q. Not after the first arrest?

A. No.

Q. You never handed any envelopes at Mr. Aucoin's instructions after his first arrest?

A. No.

Q. You --

A. I -- no, not -- no. I don't think so, no.

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All in violation of Section 1623 of Title 18, United States Code.

A TRUE BILL

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FOREMAN

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December 15, 1989